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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IOWA EXPRESS DISTRIBUTION, INC.
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Whether the federal agency's burden to show substantial justification to avoid paying legal fees to the prevailing party under the Equal Access to Justice Act, can be satisfied when the agency fails to prove a prima facie case, the respondent's position is substantial and prevailing, the agency fails to investigate stated defenses pursuant to the agency's rules, and the governments theory, though novel, is incorrect as a matter of law.

Whether the N.L.R.B. can be "substantially justified" in proceeding to a hearing on the merits of a complaint when it refuses, in violation of its own rules and procedures, to investigate known defenses.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

IOWA EXPRESS DISTRIBUTION, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Iowa Express Distribution, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the U. S. Court of Appeals for the Eighth Circuit which was entered in this proceeding on July 11, 1984.

OPINIONS BELOW

The opinion of the U. S. Court of Appeals for the Eighth Circuit is reported at 739 F.2d 1305. Its opinion and judgment are reproduced at pages A.1 through A.26. The decision of the National Labor Relations Board on Petitioner's fee application is reported at 266 NLRB No. 79 and is reproduced at pages A.27 through A.29. The Supplemental Decision of the Board's Administrative Law Judge ("ALJ"), dismissing Petitioner's claim for fees under the Equal Access to Justice Act ("EAJA"), is reproduced at pages A.30 through A.49. The Board's decision in the unfair labor practice case is not officially reported, and is reproduced at pages A.50 through A.52. The decision of the ALJ finding no prima facie case and dismissing the government's complaint is found at pp. A.53 through A.124.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1984. On October 6, 1984, Justice Blackmun ordered that the time for filing this petition be extended to November 8, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the statutes involved, the Equal Access to Justice Act, 5 U.S.C. § 504, as amended, and the National Labor Relations Act, 29 U.S.C. §§ 153 (d), 158 (a)(1), (3) and (5) and 160 (e), are set forth at pages A.168 through A.177.

STATEMENT OF THE CASE

Two unfair labor practice complaints issued by the Board on May 13 and July 24, 1981, alleged that Iowa Express Distribution, Inc., ("IED" or "Petitioner"), as a single employer was an alter ego of Iowa Parcel Service, Inc. ("IPS") and its president, William K. Walker, violated §§ 8 (a)(1), (3) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158 (a)(1), (3) and (5). One complaint alleged that IPS locked out and discharged its Des Moines, Iowa employees, closed its facility and transferred its operations to I.E.D., refusing to continue in effect IPS's collective bargaining agreement with Teamsters Local 90. The second complaint alleged that IPS closed its Omaha, Nebraska facility, discharged its employees, transferred their work to IED, and refused to bargain with Teamsters Local 554, the certified collective bargaining representative. (A.55-57)

On June 10, 1981, counsel for IED wrote to the Regional Office of the National Labor Relations Board ("NLRB" or "Board") advising that IED was neither named as a respondent in the Unions' original charges nor given an opportunity to respond to the Union's amended charges against it. Counsel detailed facts that, if true, would completely exhonorate IED, and related these facts to the applicable law. Counsel also offered to cooperate with General Counsel and provide further information as required. (A.140-A.167).The General Counsel did nothing to investigate IED defenses. None of the potential witnesses were interviewed and no further evidence was sought from IED. Instead, the General Counsel proceeded directly to hearing on January 11-14, 1982, at which only

IED appeared.[1]

On June 2, 1982, the Administrative Law Judge issued his decision concluding that IED was neither an alter ego of nor joint employer with IPS or Walker, and recommending dismissal of the complaints (A.109). The ALJ specifically found that Walker alone closed the IPS terminals, that IPS transferred no work to IED, and that the unions did not even request that IED bargain with them. (See *.) He also found that IED met none of the settled criteria for joint employer or alter ego status: i.e., common ownership, financial control, management, and customers; interrelating operations; centralized labor relations; and substantial continuity of the work force. (A.99-109) No exceptions were filed and the Board, on July 9, 1982, adopted the ALJ's findings and conclusions and dismissed the complaints. (A.50-52)

On July 23, 1982, as a "prevailing party" in an "adversary adjudication" proceeding, and pursuant to the Equal Access to Justice ACT, 5 U.S.C. § 504, and the Board's rules, 29 C.F.R. §102.143-.155, IED applied for an award of its legal fees and expenses. On August 20, 1982, the NLRB General Counsel moved to dismiss the application, claiming that the litigation was substantially justified.

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[1] Walker was never found for service of the Complaint (A.62).

* (A. 115 - A. 117).

On October 28, 1982, the same ALJ who dismissed the complaints, dismissed the application in a supplemental decision. His finding that the agency position was substantially justified was based on the same evidence he had previously concluded was insignificant. He ruled that "the General Counsel presented, if not a prima facie case, a case which still had a substantial basis in fact and law...an arguable case...a 'novel but credible extension and interpretation of the law." (A.47-49) He also stated:

> General Counsel did not dispute the Applicant's contention that it undertook no investigation wherein it sought to ascertain

> evidence or positions from the Applicant either before or after issuance of the complaint. Neither did General Counsel offer any explanation for its failure to conduct such an investigation. On the state of this record, then, I am compelled to accept the Applicant's contentions in this regard. While this failure to pursue all reasonable avenues of investigation prior to litigation is regrettable, contrary to the Board's Regulations (Sec.101.4) and the instructions contained in the General Counsel's Case Handling Manual (Sec. 10056.4 and 10056.5) and certainly not to be condoned, I must conclude that the evidence which General Counsel had in its possession justified its issuance of the complaint against the Applicant as well as IPS and Walker and warranted litigation. (A.39)

The NLRB affirmed on March 7, 1983. (A.27-29)

IED appealed to the U. S. Court of Appeals for the Eighth Circuit pursuant to 5 U.S.C. § 504 (c)(2) and 29 U.S.C. §160 (f). The July 11, 1984 decision of the Eighth Circuit affirmed the Board's denial of fees and expenses. The Court, reviewing the exercise of the Board's discretion, stated that the "substantial justification" standard for agency proceedings under §504 (a) (1) of EAJA required an examination of the entire factual background, and concluded that while there was significant evidence to suggest that IED was not an alter ego of IPS, the General Counsel's position was substantially justified. Contrary to the ALJ, the Court of Appeals treated the lack of a proper investigation by the NLRB as "IED's contention", rather than an undisputed fact. (Compare A.21 with A.40) Despite the Board's refusal to divulge its pre-complaint "investigation", and noting its "considerable concern" that the "General Counsel has done little to deny the charge that there was no more than a cursory investigation", the Court of Appeals opined that its review of such investigation was "limited." (A.21)

REASONS FOR GRANTING THE WRIT

I. THE UNEVEN APPLICATION OF THE "SUBSTANTIAL JUSTIFICATION" STANDARD OF THE EAJA BY THE AGENCIES AND THE FEDERAL APPELLATE COURTS IS DEFEATING THE INTENT OF CONGRESS.

In recent years this Court has construed several of the more than 100 federal fee shifting statutes. Thus far, this Court has decided no case arising under EAJA.[2] The statute, effective October 1, 1981, has recently been amended by Congress.[3] Because of the growing number of fee applications and the disaray of the opinions of the federal appellate courts regarding the application of the "substantial justification" standard, the issue has become a critical federal question requiring clear guidance from this Court. Indeed, as the commentators have emphasized, the confusion arising from the lack of decisional uniformity among the federal courts on this central issue has caused widespread uncertainty,[4] which in turn inhibits the statute's use and defeats its purpose. Moreover, unlike other fee-shifting statutes, such as, the Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988, and Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-5(k), under which an independent judiciary decides fee issues, the EAJA requires that the initial fee determination be made by the agency itself, judging the justification for its own agents' cases. 5 U.S.C. §504(a)(1)-(3) Because of this, and because the adjudication of fee claims is not a matter within a government agency's expertise,[5] it is essential that both the agencies and the courts understand and apply the same clear and precise criteria for determining "substantial justification."

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[2] Pending before the Court is Jarboe-Lackey Feedlots, Inc. v. United States, No. 83-1916, presenting the question of the appropriate interpretation of EAJA's substantial justification standard in judicial proceedings under 28 U.S.C. §2412.

[3] H.R. 5475 amended by the Senate and passed by both houses is currently before the President for his signature or veto. The proposed amendments revise the 1981 EAJA in critical areas such as the definition of "position of the agency" and the standard of judicial review. The definition of "substantially justified" is unchanged but the congressional intent, as to that definition, is set forth in the Lesiglative History to the amendments. See S. Rep. No. 98-586, 98th Cong., 2nd Sess. 10 (1984), and H. R. Rep. 98-992, 98th Cong., 2nd Sess. 6 (1984).

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[4] See, Note, Will the Sun Rise Again for the Equal Access to Justice Act.? 48 Brooklyn L. Rev. 265, 289-95 (1982); Robertson and Fowler, Recovering Attorneys' Fees From the Government Under the Equal Access to Justice Act, 56 Tul. L. Rev. 903, 928-34 (1982); Dods and Kennedy, The Equal Access to Justice Act, 50 UMKC L. Rev. 48, 54-57 (1981). See also, 1 DEFNER & WOLF, COURT AWARDED ATTORNEY FEES ¶ 10.03 [3], at 10-31 to 10-36.

[5] Cf. Graves Trucking, Inc. v. NLRB, 692, F.2d 470 (7th Cir. 1982).

The three-year experience of the EAJA also compels Supreme Court review in this case. After one year, courts had granted 13 of 30 fee applications, administrative agencies none.[6] After two years, courts had granted 40% of the EAJA applications, agencies less than 10%, prompting one writer to remark:

> After more than two years under the statute, it is clear that the ambitious congressional purposes behind EAJA have been thwarted in agency proceedings. EAJA fee awards in these proceedings are only slightlv more frequent than sightings of Halley's comet.[7]

The latest information indicates that federal courts, during the fiscal year ended June 30, 1984, granted fees in two-thirds of their cases.[8] But judicial review is an expensive, tedious and time consuming process that thwarts the statutes purpose of providing prompt, inexpensive relief from the overbearing conduct of federal agencies. Because of its extraordinary cost, this extended process has the deleterious effect of insulating these actions from review.

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[6] Nat'l. L. J., Oct. 18, 1982, p. 8.

[7] Stewart, The Equal Access to Justice Act: A Failure in Agency Proceedings?, Nat'l L. J., May 21, 1984, p. 20.

This case highlights the problem because of the agency involved. Judicial review of proceedings involving Board cases typically occupy a disproportionate share of federal appellate dockets. As discussed below, many of the EAJA decisions by the federal courts of appeals involve NLRB denials of fee applications. At the time Petitioner's application was denied by the Board, it had also rejected all 49 fee applications presented to it.[9] This is because its General Counsel has persisted in arguing, for example, that pre-October 1, 1981 fees were not recoverable,[10] contrary to the uniform decisions of the federal courts.[11] The Board has ignored this Court's decision in Hensley v. Eckerhart, U.S. , 103 S. Ct. 1933 (1983), by denying fees even when respondents prevail on a majority of their claims. Natchez Coca-Cola Bottling Co., 269 NLRB No. 153 (1984). One commentator recently complained that "the NLRB is construing the Act in an overly restrictive manner. Such construction renders the Equal Access to Justice Act a 'toothless dragon' with little or no practical impact."[12] All of the first 110 fee applications were denied by the Board.[13]

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[8] Nat'l L. J., Sept. 24, 1984, p. 11.

[9] NLRB General Counsel's Memorandum 83-11, C.C.H. Lab. Law. Rep. ¶ 9282 (April 7, 1983).

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[10] Id. at p. 16,333.

[11] See, e.g., Tyler Business Services v. NLRB, 695 F.2d 73 (4th Cir. 1982).

[12] Peterson, The NLRB and Equal Access to Justice: A Promise Unfulfilled?, 34 Lab. L. J. 266, 267 (1983).

[13] Lewis, NLRB Policy Under the Equal Access to Justice Act, Nat'l. L. J., Apr. 9, 1984, p. 18.

To date, the NLRB has granted only 4 of 145 applications.[14]

Congress recognized that "[f]or many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process" and "the Government with its greater resources and expertise can in effect compel compliance with its position." H.R. Rep. No. 1418, 96th Cong. 2d Sess. 9-10, rep. in 1980 U.S. Code Cong. & Ad. News 4984, 4988 ("H.R. Rep. No. 1418"). The EAJA Act, another statutory exception to the "American Rule", was designed to place government litigants on an equal footing with private parties. Id. at 6. As two writers have observed:

> The Act's legislative history makes clear that Congress viewed the Act as a general regulatory reform measure as well as a mechanism for helping small litigants to vindicate their rights. Concerned about what it perceived as abuse of authority by

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[14] October 26, 1984 telephone report to Wendy E. Ogden by NLRB Office of the Executive Secretary.

> federal agencies, especially with respect to small businesses, Congress imposed the risk of a fee award as an incentive for agencies to police their own enforcement and other litigation activities more vigorously, so that only sound, well-prepared cases would be initiated or litigated (footnotes omitted; emphasis added).

Robertson and Fowler, supra note 4 at 914.

Section 504(a)(1) of the EAJA mandates that an agency award fees and expenses to a prevailing respondent unless the agency can prove "substantial justification" for both its factual and legal positions. (A.8) By devising the "substantial justification" standard, Congress expressly rejected as unduly narrow the "arbitrary, frivolous, unreasonable or groundless" requirement imposed on prevailing defendants in Title VII cases under Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). See, H.R. Rep. No. 1418 at 14. Congress likewise rejected, as overly burdensome, a purely discretionary standard for agencies because of their perceived reluctance to award fees against themselves. Its goal is "to caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous." H.R. Rep. No. 1418 at 14. It even rejected a "reasonably justified" standard. S. Rep. No. 253, 96th Cong. 1st Sess. 8.

In fact, the 1984 legislative history to the most recent amendments to the EAJA[15] attempts to clarify the "substantial justification" standard. The Senate focused on the original Senate Judiciary Committee action that rejected the "reasonably justified" standard, and indicated that the test should be "slightly more stringent than reasonable." S. Rep. No. 98-586, 98th Cong., 2nd Sess. 10 (1984). The Senate recognized that it is very difficult to determine what "is" substantially justified, finding it easier to cite with approval those cases reviewing agency actions it considered not "substantially justified".

For example, it cited Enerhaul v. NLRB, 710

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[15] Supra, Note 3.

F.2nd 748 (11th Cir. 1983) as an example of its view that when an agency disregards applicable case law and ignores precedent, its position is not substantially justified. The Senate also approved the language in Enerhaul wherein the Eleventh Circuit held that the finding of a prima facie violation of the NLRA does not, by itself, equal a finding of "substantial justification" for purposes of the EAJA. Id.

Significantly,the Senate also declared that when an agency, without sufficient reason fails to follow the Administrative Procedure Act or other statute, its conduct must fail the substantial justification test. Id. at 11. The Senate admonished that "as courts and agencies are presented with more cases they should be mindful to be faithful to one of the EAJA's purposes: that only sound, well prepared cases be initiated and that the government must make a "strong showing" that its position was substantially justified. Id.

Similarly, the House of Representatives has recognized that the agencies and courts are misconstruing the "substantially justified" standard. See, H. R. Rep., 98-992, 98th Cong., 2nd Sess. 6 (1984). In this most recent report, preparatory to the 1984 amendments, the House found that it was especially puzzling to find statements by some courts that an administrative decision may be "substantially justified" under the EAJA even if it must be reversed because it was arbitrary and capricious or was not supported by substantial evidence. "Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act" Id. at 7.

II. THE EIGHTH CIRCUIT'S "REASONABLENESS" TEST IS CONTRARY TO CONGRESSIONAL INTENT

The Eighth Circuit's "substantial justification" analysis wrongly applied a "reasonableness" test to the General Counsel's litigation and pre-litigation activity. The Court claimed, "Our decision hinges on whether it was reasonable for the General Counsel to assert that IED was an alter ego of, or single employer with, IPS." (emphasis added) (A.18-19). It also stated:

> [O]ur review is limited to whether there was information available to the General Counsel that would have disproved the claim that IED was an alter ego of IPS, thus making the General Counsel's position unreasonable." (Emphasis added) (A.22).

And, the Court concluded, "We believe that the government's case against IED had a reasonable basis in fact." (Emphasis added) (A.-23).

Finally, the Court reasoned,

> Although the case against IED may not have been as strong for alter ego status as in these [other] Board decisions, nevertheless, the legal theory advanced by the General Counsel was not unreasonable within the framework of the EAJA. (Emphasis added) (A.26)

As discussed above the legislative history of the EAJA establishes that the "substantially justified" standard was meant to be more than just "reasonable". Moreover, the legislative history of the pending amendments specifically approved the D.C. Circuits holding in Spencer

v. NLRB, 712 F.2d 539, 558 (D.C. Cir. 1983), finding that the test "should, in fact, be slightly more stringent than one of *reasonableness*." S. Rep. No. 98-586 at 10.

The ALJ, with Board approval, concluded that the General Counsel's case was "lacking", had "no evidence" to support it, and that there was "nothing beyond mere suspicion,"[16] (A.109.) In his fee decision, however, where the same evidence suddenly became "substantial" (A.47), the ALJ conceded that the government had not even established a *prima facie* case. [17] (A.47) To the contrary, as the Eighth Circuit was forced to concede, there was "significant evidence" that IED was not a joint employer or alter ego (A.20), and that there was "significant evidence" supporting IED's defense. Yet, the Court held that because the General Counsel's position was "not unreasonable" there was "substantial justification" for the agency's proceedings. Such a result seems to require that before a prevailing party can recover fees, it must convince a court or agency that its case was ironclad beyond any reasonable doubt or that the government's case was frivolous or arbitrary.

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[16] The Board has repeatedly held that "suspicion is not an adequate substitute for evidence." Gonic Mfg. Co., 141 NLRB 201, 209 (1963). Accord, L-K Foods, 134 NLRB 956, 957 (1961); Boston and Lockport Block Co., 98 NLRB 686, 692 (1952).

[17] "General Counsel cannot prove its justification in issuing complaint merely by relying on its *prima facie* case, no matter how dazzling... the existence of a *prima facie* case does not, *ipso facto*, demonstrate 'substantial justification'." Debolt Transfer, Inc., 271 NLRB No. 51 (1984) (A.L.J. slip op. at 7-8).

This result is contrary to the Congressional intent, as discussed. It defeats the purposes of the Act by making fee awards to prevailing respondents the rare exception, and encourages agencies to continue to litigate weak or tenuous cases with impunity.

III. THE EIGHTH CIRCUIT'S DECISION IS IN IRRECONCILABLE CONFLICT WITH OTHER FEDERAL COURTS OF APPEAL.

The first case awarding fees against the

Board was Tyler Business Services, Inc. v. NLRB, 695 F.2d 73 (4th Cir. 1982), where the employer prevailed on the merits only at the judicial level. The court found that the General Counsel's case "lack[ed] a reasonable factual basis."

In the present case, the ALJ, in his original decision (prior to his reconstruction of the record in the General Counsel's favor), also characterized the General Counsel's case as "lacking". (A.103)

In Enerhaul, Inc. v. NLRB, (supra) cited with approval by the Senate, the Board had found the General Counsel made out a prima facie case, fees were still awarded to the prevailing employer. The Court concluded that the General Counsel's legal theory was unsupported by Fourth Circuit case law. Similarly, none of the well-settled requirements for alter ego or joint employer status -- under decisions of this Court, the Eighth Circuit, or the Board -- justified the General Counsel's complaints against IED,[18] and the ALJ so concluded.

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[18] E.G. *South Prairie Constr. Co. v. Local 627, Operating Engineers*, 425 U.S. 800 (1976); *Radio and Television Broadcast Technicians, Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965); *Mastell Trailer Corp. v. NLRB*, 682 F.2d 753 (8th Cir. 1982); *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *Trust Fund v. Edwin M. Green, Inc.*, 653 F.2d 972 (5th Cir. 1981); *NLRB v. Borg-Warner Corp.*, 663 F.2d 666 (6th Cir. 1981); *Meatcutters Local 567 v. NLRB*, 663 F.2d 223 (D.C. Cir. 1980); *Industrial Personnel Group v. NLRB*, 657 F.2d 226 (8th Cir. 1982); *cert*. *den*. 454 U.S. 1148 (1982); *Davis v. NLRB*, 617 F.2d 1264 (7th Cir. 1980); *NLRB v. Tricor Products, Inc.*, 636 F.2d 266 (10th Cir. 1980); *Teamsters Local 610 v. NLRB*, 624 F.2d 831 (8th Cir. 1980); *Pulitzer Publishing Co. v. NLRB*, 618 F.2d 1275 (8th Cir. 1980); *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3rd Cir. 1979); *NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 266 (9th Cir. 1979); *L.A. Marine Hardware Co. v. NLRB*, 602 F.2d 1302 (9th Cir. 1979); *United Telegraph Workers v. NLRB*, 571 F.2d 665 (D.C. Cir. 1978); *NLRB v. Triumph Curing Center*, 571 F.2d 462 (9th Cir. 1978); *NLRB v. C.K. Smith & Co., Inc.*, 569 F.2d 162 (1st Cir. 1977), *cert. den.*, 436 U.S. 957 (1979); *NLRB* v. *Bell Company, Inc.*, 561 F.2d 1264 (7th Cir. 1977); *Russom v. Sears, Roebuck and Co.*, 558 F.2d 439 (8th Cir. 1977); *cert. den.*, 434 U.S. 955 (1977); *Virginia Stage Lines, Inc. v. NLRB*, 441 F.2d 499 (4th Cir. 1971); *NLRB v. New Madrid Man'f. Co.*, 216 F.2d 908 (8th Cir. 1954); *Cardio Data Systems*, 263 NLRB No. 11 (1982); *D.M.R. Corp.*, 258 NLRB No. 139 (1981); *International Harvester Co.*, 247 NLRB 791

As the ALJ and the Court of Appeals noted, extensive documentary evidence was readily available to the General Counsel, prior to the issuance of his complaints, that would have shown that IED was not an alter ego of or joint employer with IPS or Walker. Both the ALJ and the Eighth Circuit, however, concluded that the General Counsel's legal theory was substantially justified because it advanced "a novel but credible extension and interpretation of the law". (A.48, A.23) The decision that fees should be denied in such circumstances is directly contrary to the opinion of the D. C. Circuit in Spencer v. NLRB, 712 F.2d at 558-59,

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Footnote [18] Con't.

(1980); Tanaka Constr., Inc., 249 NLRB 238 (1980); Smyth Mfg. Co., 247 NLRB 1139 (1980); Shield-Pacific, Ltd., 245 NLRB 409 (1979); Sossamon Electric Co., 241 NLRB 324 (1979); Roman Catholic Diocese of Brooklyn, 236 NLRB 16 (1978); Appalachian Constr., Inc., 235 NLRB 685 (1978); Co-Ed Garment Co., 231 NLRB 848 (1977); Parklane Hosiery Co., 203 NLRB 597 (1973); Frank N. Smith Associates, Inc., 194 NLRB 212 (1971); Gerace Constr., Inc., 193 NLRB 645 (1971).

where the Court spoke of such a "long shot" case in these terms:

> "Suits of this kind are often 'test cases'; the government has decided that, though hitherto it routinely abided by the dictates of the controlling precedent, the time has come to venture a challenge to the rule. The result is that the private party, through no fault of his own, is forced to expend an unusually large amount of time and effort defending his claims. The value of periodic reexamination of legal norms may make us willing to tolerate the resultant inequity, but it is difficult to justify forcing the private party, who has been randomly selected by the government to be the target of its test case, to pay the large cost of litigating the issue if he ultimately prevails. In short, this is precisely the sort of situation in which the public at large, not the individual litigant, should pay the cost of 'refining the administration of the law'.
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> * * *
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> The government is always free, of course, to seek modification or repudiation of established doctrine, but individual private litigants should not be compelled to subsidize such reevaluation of controlling doctrine.

It is difficult to perceive a contray view. Yet the Eighth Circuit had little difficulty upholding the Board's "long shot" in this case. No doubt IED would have never been required to endure the months of litigation had the Board been required to adopt the D.C. Circuit's responsible approach. Unfortunately, the disaray of the federal Courts allows the Board to proceed with studied disregard of Congressional intent to protect the small businessman from an overreaching government.

IV. JUSTICE REQUIRES THAT A PREVAILING RESPONDENT IN AN NLRB UNFAIR LABOR PRACTICE PROCEEDING MUST BE AWARDED LEGAL FEES WHEN THE BOARD'S INVESTIGATION VIOLATES ITS OWN RULES AND PROCEDURES.

Unlike such other agencies as the Federal Trade Commission, the Internal Revenue Service and the Occupational Safety and Health Commission, the NLRB institutes adversary administrative proceedings only after the filing of an unfair labor practice charge by a private party. 29 U.S.C. § 160(f). The NLRB's rules and regulations specify that "as a part of the investigation... the person against whom the charge is filed... is asked to submit a statement of his position with respect to the allegations.

The case is assigned for investigation to a member of the [regional office] field staff, who interviews representatives of the parties and other persons who have knowledge as to the charges, as is deemed necessary." 29 C.F.R. § 101.4.

The NLRB's published Case Handling Manual, C.C.H. NLRB Case Handling Manual, ¶ 501 564-67, 582, is even more precise:

> The purpose of the investigation is to ascertain, analyze and apply the relevant facts in order to arrive at a proper disposition of the case.... [W]hen communicating with charged parties [respondents] to obtain evidence, Board agents should generally describe to representatives of the charged party the nature of the allegations under investigation. With respect to disclosure, Board agents should relate the basic contentions that have been advanced with regard to the various violations alleged... . Every attempt should be made to interview main representatives (corporate officers, international representative) of the charged party.... [T]he charged party's counsel or representative is to be contacted and afforded an opportunity to be present during the interview of any supervisor or agent... Questions opened up by investigation of the 'defense' case should be pursued even if reinterviews of witnesses should be examined.... [T]he keystone of the investigation is the affidavit. Every effort should be made to

> reduce statements of witnesses, friendly or hostile, to affidavit form. Extreme care should be taken by the Board agent in recording the facts given by witnesses. (emphasis in original)

As this Court has recognized, any NLRB pre-complaint investigation includes "interviewing witnesses and reviewing documents." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 139 (1975).

The NLRB does not permit discovery. It refuses to disclose its regional investigative memoranda, and the affidavits of the General Counsel's witnesses can only be obtained after they testify at a hearing, and thus only for cross-examination purposes. Thus, any respondent is powerless to determine the extent of a Board investigation. Morris, THE DEVELOPING LABOR LAW, Vol. II, 1624-28 (2d ed. 1983). One court has labelled Board proceedings "trial by ambush." New England Medical Center Hospital v. NLRB, 548 F.2d 377, 383 (1st Cir. 1976). The General Counsel refuses to divulge the scope of regional office investigations in all EAJA cases.

General Counsel's Memorandum, supra note 9 at p. 16,332.

In this case, the General Counsel had no pre-complaint communications with IED, made no effort to interview its representatives, and requested no documents or affidavits from this Petitioner. The Court of Appeals acknowledged that "the General Counsel has done little to deny the charge that there was no more than a cursory investigation." (A.21) In fact, there was no investigation of IED's proferred position. "[F]airness requires that compliance with the [Case Handling] Manual's procedures for resolving legal and factual issues be an absolute prerequisite to a finding that the General Counsel was substantially justified in suing a small businessman." Peterson, supra note 12 at 272.

Obviously, the Eighth Circuit disregarded the undisputed fact, as found by the ALJ, that the General Counsel "undertook no investigation wherein it sought to ascertain evidence or positions from the Applicant either before or after issuance of the complaint," and the ALJ's conclusion that the General Counsel's "failure to pursue all reasonable avenues of investigation" violated the Agency's own Rules and Case Handling Manual. (A.40)

As stated by the Chairman of the Administrative Conference of the United States, the body directed by Congress to coordinate agencies' procedures implementing EAJA (5 U.S.C. §504(e)), "[a]n award should follow when the government has been careless in investigating and developing the facts on which the case is based, for example, when it brings an enforcement action without reasonably thorough investigation that would have shown no violation had occurred." Robertson and Fowler, supra note 4 at 934.

Lower federal courts have refused to find substantial justification for agency proceedings and have awarded EAJA fees when the government's investigation was inadequate, superficial or violated its own rules. Williamson v. United States, 573 F. Supp. 11 (N.D. Ga. 1983); Bertrand v. United States, 562 F. Supp.

222 (D. Ore. 1983); Boudin v. Thomas, 554 F. Supp. 703 (S.D. N.Y. 1982); Donovan v. Cunningham, 541 F. Supp. 276 (S.D. Tex. 1982). Even in Title VII cases under the more exacting Christiansburg standard, prevailing defendants have recovered fees in such circumstances. Durrett v. Jenkins Brickyard, Inc., 674 F.2d 911 (11th Cir. 1982); EEOC v. Ipco Hospital Supply Co., 565 F. Supp. 134 (S.D. N.Y. 1983); Harmond v. Board of Regents, 31 FEP Cas. 940 (S.D. Ga. 1983); EEOC v. Union Camp Corp., 536 F. Supp. 64 (W.D. Mich. 1982).

The Fourth Circuit, in Tyler Business Services v. NLRB, 695 F.2d at 75, cautioned that the government's initial decision to institute proceedings might not justify fees but "this circumstance, however, would not preclude an award, if at subsequent stages of the administrative process... it appears that the government's position at these levels of litigation was not substantially justified." Accord, Environmental Defense Fund, Inc. v. Watt, 722

F.2d 1081 (2d Cir. 1983). The Eighth Circuit's opinion does not even mention the June 10, 1981 letter of IED's counsel to the Board's General Counsel -- seven months prior to hearing - which exhaustively explained IED's factual and legal defense to the complaints and offered to cooperate. (A.140-A.167.)[19] The ALJ's June 2, 1982 decision found the facts and applied the law just as IED had represented them. Tragically, Petitioner's costs of preparation for and participation in a four-day hearing; its costs to review the record and prepare the post-hearing brief to the ALJ, and the cost of this protracted and unnecessary fee application proceeding, could all have been avoided if, at any time prior to the hearing, the General Counsel would have followed the Board's written procedures and conducted the fair and impartial investigation that he knew was required.

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[19] Compare International Maintenance Systems Group, Inc., 267 NLRB No. 188 (1983), where the Board denied EAJA fees to a respondent which refused to provide witnesses and documents during the investigation.

It appears that the Board consistently denies fee applications from prevailing respondents -- unions and employers alike -- although it is not reluctant, even without express statutory authority, to order an employer in an unfair labor practice case to pay the Agency's or a union's litigation expenses "to remove frivolous litigation from crowded Board and court dockets." N.L.R.B. 44th Ann. Rep. 171 (1980).[20] We urge that the intent of the EAJA is to impose no less on government agencies. Surely Congress intended that they should not be immune from judicial scrutiny and fee sanctions when the EAJA creates a presumption of a fee award in favor of a prevailing respondent and requires the agency to prove that its cases were "sound" and "well-prepared", not "weak" or "tenuous".

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[20] E.g., Autoprod, Inc., 265 NLRB No. 42 (1982); Heck's, Inc., 215 NLRB 765 (1974); Tidee Products, Inc., 194 NLRB 1234 (1972).

An agency, a fortiori, cannot have substantial justification for a case against a prevailing respondent when the government violates its own rules and procedures. One court, in another context, criticized the government's inadequate investigation and its "stonewall[ing] approach" to the adverse party and the judiciary. International In-Flight Catering Co., Ltd. v. NMB, 555 F.2d 712, 718 (9th Cir. 1977). And as Justice Frankfurter observed in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172 (1951):

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, onesided determinations of facts decisive of rights.
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> * * *
>
> No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important for a popular government, that justice has been done." (emphasis added).

Congress has recently expressed its recognition of this fundamental principle by stating in the Legislative History to the 1984 EAJA Amendments, [Agency] conduct that must fail the "substantial justification" test arises when the agency, without suffienct reason, fails to follow the Administrative Procedure Act or other Statute. S. Rep., 98-586 at 11.

CONCLUSION

Prevailing plaintiffs in Title VII litigation are routinely entitled to their attorney's fees. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). Congress intended the same presumption in favor of prevailing respondents in EAJA cases. This statute limits eligibility for awards to small respondents, like IED, with limited financial resources, and recovery is restricted to a rate of $75 per hour, with no "multipliers". 5 U.S.C. § 504(b)(1)(A) and (B). The Act and its laudable policies have been totally ignored and grossly misinterpreted by administrative agencies, particulary the NLRB. The Eighth Circuit, although troubled by this case, perpetuated the reality that there is little justice under the Equal Access to Justice Act.

A writ of certiorari should be granted to eliminate the uneven application of the "substantial justification" standard, in order to effectuate the purpose of Equal Access to Justice Act.

Respectfully submitted,

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November, 1984

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 83-1589 September Term, 1983

Iowa Express Distribution, Inc., *
Petitioner, *
vs. * Petition for Judicial Review & For Leave to Appeal
National Labor Relations Board, *
Respondent. *

This cause came to be heard on the record from the National Labor Relations Board, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the order of the National Labor Relations Board, denying attorneys fees in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

July 11, 1984

Total costs of respondent for briefs for recovery from petitioner: $45.00

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

8/6/84

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 83-1589

Iowa Express	*	
Distribution, Inc.,	*	
	*	
Petitioner,	*	
	*	On Petition for
v.	*	Review of Order
	*	of National Labor
National Labor	*	Relations Board
Relations Board,	*	
	*	
Respondent.	*	

Submitted: December 13, 1983

Filed: July 11, 1984

Before HWANEY and FAGG, Circuit Judges,
and HANSON,* Senior District Judge.

FAGG, Circuit Judge.

Iowa Express Distribution, Inc. (IED) petitions this court for review of an order of the National Labor Relations Board dismissing

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*The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

IED's application for attorneys fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(c)(2). The issue for review is whether the Board abused its discretion in denying attorneys fees by deciding that the NLRB General Counsel was substantially justified in bringing an unfair labor practice case against IED. The dispute focuses on whether it was reasonable for the General Counsel to allege in its suit that IED was merely an alter ego of, or single employer with, Iowa Parcel Service (IPS). We affirm the Board's decision to deny attorneys fees.

I. Background

A. Facts

William K. Walker was the sole stockholder and president of a number of corporations in the trucking industry, including Merchants Delivery Company of Kansas City, Missouri. In 1978, Merchants acquired IPS, a common carrier serving 13 states in the Midwest with its main terminal in Des Moines, Iowa, and additional terminals in

Waterloo, Iowa, and Omaha, Nebraska. Employment conditions at IPS were governed by collective bargaining agreements between IPS and Teamsters Local 90 in Des Moines and Teamsters Local 554 in Omaha. Because IPS was losing money, Walker decided to halt operations temporarily on March 23, 1981, and directed that the terminal gates be locked. On April 14, Walker permanently discontinued the operations of IPS.

Two long-time managers of IPS, Harold Sternberg and Randy McElroy, decided to go into business for themselves when they learned from Walker in early February 1981 that IPS would not likely continue in business. Walker encouraged Sternberg and McElroy to start their own company, and in lieu of severance pay, gave them a $25,800 interest-free loan to get them started. On March 4, 1981, IED's certificate of incorporation was filed, listing only Sternberg and McElroy as shareholders, directors, and officers. Walker was never an IED shareholder, director, or officer. Before resigning from IPS, Sternberg solicited several IPS pool customers for the new venture.

The scope of IED's operations was substantially more limited than IPS. IPS had served 1000 communities in Iowa and also had served 12 other midwestern states. IED served only 35 Iowa communities and the Omaha and Rock Island, Illinois areas. IPS's annual revenues in 1980 had exceeded $7 million. After eight months of operations, IED's revenues were $266,042. IPS had employed 90 drivers and dockworkers. IED employed only five drivers, who were referred to it by the Iowa employment office. No former IPS employees sought employment with IED. As the administrative law judge notes, however, IED's business was "identical in type if not in scope to a portion of IPS's operations."

B. Procedural History

The General Counsel of the NLRB issued an unfair labor practice complaint alleging that IED, as an alter ego of, or single employer with, IPS and its president, William K. Walker, violated sections 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) and (5). The complaint alleged that IPS had locked out and discharged its employees at IPS's Des Moines, Iowa facility, closed that facility, and transferred some of its operations to IED, while refusing to continue in effect its collective bargaining agreement with Teamsters Local 90. The complaint also alleged that IPS had closed its Omaha, Nebraska facility, discharged its employees, transferred its work to IED, and refused to bargain with Teamsters Local 554. After a four-day hearing, an administrative law judge found IPS guilty of the unfair labor practices alleged but recommended that the complaint against IED be dismissed. The administrative law judge found that the General Counsel's evidence, "while warranting grave suspicion," failed to establish that IED was an alter ego of, or single employer with, IPS. The Board adopted the administrative law judge's recommended order and dismissed the complaint against IED.

As a "prevailing party" IED then applied for $27,138.38 in attorneys fees and expenses pursuant to the EAJA. The same administrative law judge who dismissed the unfair labor practice complaint against IED also dismissed IED's application for attorneys fees, stating that "the evidence which General Counsel had in its possession justified its issuance of the complaint against the Applicant [IED] as well as IPS and Walker and warranted litigation." He concluded that "the General Counsel presented, if not a prima facie case, a case which still had a substantial basis in fact and law." The Board upheld the administrative law judge's dismissal of the application for attorneys fees and IED filed its petition for review with this court.

II. Equal Access to Justice Act

A. Overview

The Equal Access to Justice Act, 5 U.S.C.

§ 504, provides that an agency shall award attorneys fees and expenses to a prevailing party in connection with an agency adversary adjudication "unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified." 5 U.S.C. § 504(a)(1). "[T]he test of whether the position of the United States is substantially justified is essentially one of reasonableness in law and in fact. The government bears the burden of proving the substantial justification of its position." _Foley Construction Co. v. U.S. Army Corps of Engineers_, 716 F.2d 1202, 1204 (8th Cir. 1983). "The government must therefore show that there is a reasonable basis in truth for the facts alleged in the pleadings; that there exists a reasonable basis in law for the theory it propounds; and that the facts alleged will reasonably support the legal theory advanced." _United States v. 2,116 Boxes of Boned Beef_, 726 F.2d 1481, 1487 (10th Cir. 1984). "Where the government forces a party into "lengthy administrative proceedings before final vindication of his or her rights . . . the government should have to make a strong showing . . . that its action was reasonable.'" Cornella v. Schweiker, 728 F.2d 978, 982 (8th Cir. 1984), quoting H.R. Rep. No. 1418, 96th Cong. 2d Sess. 18, reprinted in 1980 U.S. Code Congr. & Ad. News 4997. An administrative agency's fee determination under the EAJA may only be modified if there is an abuse of discretion. 5 U.S.C. § 504(c)(2).

B. "Position of the United States"

Considerable uncertainty has surrounded the question of which government position must be substantially justified. Several courts have concluded that the government position referred to in the EAJA is its position in litigation. See, e.g., United States v. 2,116 Boxes of Boned Beef, supra, 726 F.2d at 1487; Spencer v. NLRB, 712 F.2d 539, 556-57 (D.C. Cir. 1983); Electronic Modules Corp. v. United States, 702 F.2d 218, 219 (Fed. Cir. 1983). Other courts have held that the government position referred to in the EAJA is the underlying governmental action that precipitated the litigation. See, e.g., Natural Resources Defense Council v. U.S.E.P.A., 703 F.2d 700, 707 (3d Cir. 1983); Mulholland v. Schweiker, 546 F. Supp. 383, 386 (D.N.H. 1982); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 352 (D.D.C. 1982). See also Tyler Business Services, Inc. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982) (cited for both litigation and underlying action theories; compare United States v. 2,116 Boxes of Boned Beef, supra, 726 F.2d at 1487, with Rawlings v. Heckler, 725 F.2d 1192, 1195 (9th Cir. 1984)). The Ninth Circuit, noting its preference "for the broader 'underlying action' theory," has recently concluded that the government's position should be determined by "considering the totality of the circumstances prelitigation and during trial." Rawlings v. Heckler, supra, 725 F.2d at 1195-96. The Eighth Circuit has not yet decided which government position--litigation or prelitigation--is to be considered to determine substantial justification under the EAJA. We have observed, however, that "[i]n most cases 'it makes no functional difference how one conceives of the government's "position"' because 'the litigation position of the United States will almost always be that its underlying action was legally justifiable.'" Foley Construction Co. v. U.S. Army Corps of Engineers, supra, 716 F.2d at 1204, quoting Spencer v. NLRB, supra, 712 F.2d at 551-52.

The statute itself does not define the term "position of the United States". The legislative history, which has been thoroughly examined in previous opinions, is inconclusive as to which position is to be examined. See, e.g., Cornella v. Schweiker, supra, 728 F.2d at 982; Rawlings v. Heckler, supra, 725 F.2d at 1195; Spencer v. NLRB, supra, 712 F.2d at 547-49; Natural Resources Defense Council v. USEPA, supra, 703 F.2d at 707-12. The references in the legislative history to the government's position at both the agency and litigation levels suggest to us, however, that Congress was concerned with unreasonable government activity at whatever level it was encountered. See Rawlings v. Heckler, supra, 725 F.2d at 1195. We must also consider the purpose of the EAJA to determine the meaning of the government's "position." If we were to limit our consideration of the government's position to merely the stance taken in litigation, no matter how outrageous the underlying governmental action, the government would be absolved from liability if Justice Department litigators acted reasonably. See, e.g., Rawlings v. Heckler, supra, 725 F.2d at 1196; Natural Resources Defense Council v. USEPA, supra, 703 F.2d at 707; Environmental Defense Fund, Inc. v. Watt, 554 F. Supp. 36, 41 (E.D.N.Y. 1982). The litigation position approach does not address what we must conclude is at least a significant purpose of the EAJA--to encourage government regulatory agencies only to take actions that have a reasonable basis in law and in fact.

We feel that the purpose of the EAJA is best served by interpreting position of the United States to include the government's position at both the prelitigation and litigation levels. We concur in the observation of the court in Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (D.D.C. 1982):

> T]he Act is intended to proscribe frivolous government action that forces a party to resort to the courts to redress its rights. It would contradict the remedial purpose of the Act to interpret it to isolate and focus upon the reasonableness of only a single element of the government's actions, when the entire factual background may suggest a contrary conclusion.

Id. at 352 n.7 (emphasis added). The Ninth Circuit has concluded "that the remedial purpose of the EAJA is best served by considering the totality of the circumstances prelitigation and during trial." Rawlings v. Heckler, supra, 725 F.2d at 1196. We agree that the totality of the circumstances--prelitigation and litigation--must be considered to determine whether the position of the United States is substantially justified. Considering the totality of the circumstances in this case, we observe that the government's position has been consistent both at the prelitigation and litigation levels: the government has continuously maintained the merit of its position that IED was an alter ego of, or single employer with, IPS.

III. Single Employer/Alter Ego Doctrines

The central issue in this case is whether it was reasonable for the General Counsel to bring an unfair labor practices complaint against IED. In the complaint, the General Counsel relied upon alternative theories that IED was either an alter ego of, or single employer with, IPS. Although the single employer and alter ego doctrines are related, they are conceptually distinct. See Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 24 (1st Cir. 1983); Naccarato Construction Co., 233 NLRB 1394, 1398-99 (1977). The single employer doctrine is a Board creation that treats two or more related enterprises as a single employer for purposes of holding the enterprises jointly to a single bargaining obligation or for the purpose of considering liability for any unfair labor practices. See Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 504-05 (5th Cir. 1982). Four factors are considered to determine whether two distinct business entities are to be treated as a single employer for purposes of the National Labor Relations Act: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965); NLRB v. G.H.R. Energy Corp., 707 F.2d 110, 113 (5th Cir. 1982); Penntech Papers, Inc. v. NLRB, supra, 706 F.2d at 25; Mastell Trailer Corp. v. NLRB, 682 F.2d 753, 754 (8th Cir. 1982). No one of these factors is controlling nor need all criteria be present;

single employer status is a factual question that ultimatelv depends upon all the circumstances of the individual case. Penntech Papers, Inc. v. NLRB, supra, 706 F.2d at 25; NLRB v. DMR Corp., 699 F.2d 788, 791 (5th Cir. 1983).

While the single employer doctrine focuses on whether two or more existing business entities should jointly be held to a single labor obligation, the alter ego doctrine focuses on whether one business entity should be held to the labor obligations of another business entity that has discontinued operations. See Note, Bargaining Obligations After Corporate Transformations, 54 N.Y.U. L. Rev. 624, 638 (1979). The essential inquiry under the alter ego analysis is "[w]hether there was a bona fide discontinuance and a true change of ownership * * * or merely a disguised continuance of the old employer." Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942). To determine whether one enterprise is an alter ego of another, many of the same factors are considered as in the single employer analysis: whether there is substantially identical ownership, management and supervision, business purpose, operation, customers, and equipment. See Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., supra, 690 F.2d at 507. Another factor that is considered is whether there is a substantial continuity of the work force from the union to the non-union employer. Id. at 508. Of these factors, one of the most important is the existence of continued control or ownership by the owner of the discontinued company. NLRB v. Bell Company, Inc., 561 F.2d 1264, 1267-68 (7th Cir. 1977). "[T]he focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement, such as through a sham transfer of assets." Penntech Papers, Inc. v. NLRB, supra, 706 F.2d at 24; Carpenters Local

Union No. 1846 v. Pratt-Farnsworth, Inc., supra, 690 F.2d at 508. "Unlawful motive or intent are critical inquiries in an alter ego analysis, inquiries which are wholly absent in a single employer analysis." Penntech Papers, Inc. v. NLRB, supra, 706 F.2d at 24; NLRB v. Tricor Products, Inc., 636 F.2d 266, 270 (10th Cir. 1980). See also N.Y.U. L. Rev. Note, supra at 639 ("for an alter ego finding * * * the employer must act from anti-union animus"). When an alter ego finding is made, a non-signatory enterprise will be held bound to the collective bargaining agreement entered into by the signatory enterprise. See Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., supra, 690 F.2d at 508-09; Sturdevant Sheet Metal & Roofing Company, Inc. v. NLRB, 636 F.2d 271, 274 (10th Cir. 1980).

IV. Analysis

Our decision hinges on whether it was reasonable for the General Counsel to assert that IED was an alter ego of, or single employer with, IPS. In this case, we feel that the alter ego doctrine is more appropriate than the single employer doctrine. The General Counsel did have considerable evidence supporting alter ego status. IED was formed by two high ranking and long term managerial employees of IPS. Sternberg had once been an officer of IPS. McElroy and Sternberg formed IED with Walker's encouragement while IPS was still in business. Walker provided the initial financing for IED with an unsecured, no-interest loan. Sternberg solicited the business of some of IPS's customers for IED while he was still working at IPS, and he did so with Walker's knowledge and consent. IED's business was identical in type to a portion of IPS's operations. IED used some of IPS's equipment when it first began. Most importantly, as the administrative law judge noted, "Walker had expressed an attitude toward his unionized employees from which one could conclude that he would have gone to almost any length to achieve his objective in regard to them." It is significant that Walker, Sternberg and McElroy all made statements indicating that IED was created only to preserve certain pool shipment business until IPS reopened. Indeed, there was testimony that Walker stated that IED was "my little device that I have created to hold the pool shipments until we go back to work at Iowa Parcel." At another time, Walker, referring to IED, purportedly told someone to "leave my little company alone." The evidence, taken as a whole, tended to establish that the operations of IED and IPS were interrelated, that there was a significant degree of common management, and at least to the extent of the initial financing, that Walker had a financial interest in IED. Moreover, the surrounding circumstances suggested that IED may have been formed specifically to avoid the labor obligations of IPS, a consideration that is at the heart of the alter ego inquiry.

We recognize, of course, that there was significant evidence to suggest that IED was not an alter ego of IPS. There was no substantial identity of ownership between IED and IPS. Indeed, Sternberg and McElroy owned no interest in IPS and Walker owned no interest in IED. Although there was evidence that IED was formed for Walker's benefit--that is, to preserve certain pool accounts--there was no evidence to show that Walker exercised any control over the day-to-day management of IED. IED had only a very small portion of IPS's former business. Finally, there was no substantial continuity of the work force from IPS to IED.

One troubling aspect of this case is IED's contention that the General Counsel's investigation was inadequate and violated the Board's own procedures. Had there been an adequate investigation, IED contends, no complaint would have issued. The General Counsel has done little to deny the charge that there was no more than a cursory investigation before the unfair labor practices complaint against IED was filed. It is a matter of considerable concern if indeed the General Counsel failed to perform its duty, according to its own rules, to pursue a proper investigation before bringing suit. Nevertheless, our review is limited to whether there was information available to the General Counsel that would have disproved the claim that IED was an alter ego of IPS, thus making the General Counsel's position unreasonable.

IED points to the following documents which it feels show conclusively that IED and IPS were unrelated: (1) the IED articles of incorporation showing that neither IPS nor Walker was connected with IED; (2) the IPS articles of incorporation showing that neither IED, Sternberg nor McElroy was a principal in IPS; (3) IED's lease for premises separate from IPS; (4) IED's invoices for rental of its own equipment; and (5) I.C.C. decisions granting IED independent operating authority. Certainly all of these documents are evidence of the separate existence of IED and IPS. None of this evidence, however, is in any way conclusive. Indeed, the General Counsel's argument at the hearing was not so much that distinct corporate forms had not been recognized, but rather that IED, although formally separate from IPS, had been created merely as a device of Walker's to hold onto business until he straightened out his problems with the local unions at IPS. See Scott Printing Corporation, 237 NLRB 593, 601 (1978) ("corporate forms, being largely paper arrangements, do not always reflect the business realities of a given situation"). Given the evidence available to the General Counsel, this was a plausible, if ultimately incorrect theory. We believe that the government's case against IED had a reasonable basis in fact.

The administrative law judge concluded that in this case the General Counsel advanced, in good faith, a "novel but credible extension and interpretation of the law." See, H.R. Rep. No. 1418, 96th Congr., 2d Sess. 11 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 4953, 4990. The administrative law judge observed that "it was arguable" and he "could have inferred, that Walker's financial support of the Applicant [IED], in light of the statements made by the various participants, gave him continued actual control over the Applicant such as would establish alter ego status notwithstanding the absence of other evidence of 'substantially identical' ownership."

Although the government's theory was rejected by the administrative law judge, the General Counsel relied on a nucleus of Board decisions which provided plausible support for the argument that IED was an alter ego of IPS. See American Pacific Concrete Pipe Company, Inc., 262 NLRB 1223 (1982) (alter ego relationship found without common ownership where substantially identical business purpose, operations, equipment, type of customer, and common control of labor relations existed); Big Bear Supermarkets No. 3, 239 NLRB 179 (1978); Circle T Corporation, 238 NLRB 245 (1978); Ramos Ironworks, Inc., 234 NLRB 896 (1978) (although legal ownership of the two corporations was distinct, alter ego relationship found where corporations had common business purposes and operational control). Although the common ownership element was missing in these cases, the Board nevertheless made findings of alter ego status. In Circle T Corporation, supra, the Board considered a situation similar to what the General Counsel was attempting to show in this case, "with the closure and subsequent reopening [of a new corporation] being no more than an effort by a firm losing money to be rid of the costs of unionization." Id. at 246. The Board found especially relevant the evidence that the sole owner of Circle T Corporation had told an employee that "Circle T was going to be out of business in 4 or 6 weeks, that he had plans to start another company, and that this was being done as a 'maneuver' to get the Union out." Id. These comments that the Board found relevant are, of course, very similar to the comments credited to Walker in this case, indicating that IED was just a device of his to hold onto business until his union problems were straightened out. Although the case against IED may not have been as strong for alter ego status as in these Board decisions, nevertheless, the legal theory advanced by the General Counsel was not unreasonable within the framework of the EAJA.

Accordingly, we hold that the Board did not abuse its discretion in denying attorneys fees because the General Counsel was substantially justified in asserting that IED was an alter ego of IPS.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

266 NLRB No.79

D-9769
Des Moines, IA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Iowa Parcel Service, Inc. and Iowa Express
Distribution, Inc. and William K. Waler,
an individual and alter ego

and

Case 18-CA-7146(E)

General Team and Truck Drivers, Helpers
and Warehousemen, Local Union No.90,
Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

and

Case 18-CA-7369(E)
(formerly 17-CA-10420)

General Drivers & Helpers Union, Local
No. 554, Affiliated with International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America

DECISION AND ORDER

On October 28, 1982, Administrative Law Judge Michael O. Miller issued the attached Supplemental Decision in this proceeding. Thereafter, the Applicant, Iowa Express Distribution, Inc. filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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[1] In affirming the Administrative Law Judge's dismissal of the "Application for Attorney's Fees and Expenses," we do not adopt his findings regarding the conduct or sufficiency of General Counsel's investigation in the underlying unfair labor practice proceeding.

ORDER

It is hereby ordered that the application of the Applicant, Iowa Express Distribution, Inc., Des Moines, Iowa, for an award under the Equal Access to Justice Act be, and it is hereb is dismissed.

Dated, Washington, D.C. March 7, 1983

John C. Miller, Chairman

Howard Jenkins, Jr., Member

Robert P. Hunter, Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Iowa Parcel Service, Inc. and Iowa Express
Distribution, Inc.

and

Case No. 18-CA-7146(E)

William K. Walker, An Individual and
Alter Ego

and

General Team and Truck Drivers, Helpers
and Warehousemen, Local Union No.90,
Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

and

Case 18-CA-7369(E)
(formerly 17-CA-10420)

General Drivers & Helpers Union, Local
No. 554, Affiliated with International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America

SUPPLEMENTAL DECISION

(EQUAL ACCESS TO JUSTICE ACT)

On July 9, 1982, the National Labor Relations Board, herein called the Board, issued its Order in the above-entitled proceeding[1] adopting the findings and conclusions of this Administrative Law Judge as contained in his Decision dated June 2, 1982[2] and, inter alia, dismissing "that portion of the complaint alleging that Respondent Iowa Express Distribution, Inc. committed unfair labor practices...." On July 23, 1982, Iowa Express Distribution, Inc., herein called the Applicant, timely filed an Application for Attorney Fees and Expenses under the Equal Access to Justice Act, herein called EAJA,[3] and Section 102.143 of the Board's Rules and Regulations.

The Applicant asserts that it was a prevailing party in an adversary proceeding before the

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[1] Unpublished.

[2] JD-238-82.

[3] P.L. 96-481, 94 Stat. 2325.

Board. It further asserts, and supports said assertions with appropriate affidavits and financial reports, that it is an Iowa corporation, engaged in the intrastate and interstate delivery of freight and commodities, employing less than 500 employees and having a net worth of less than $5,000,000. Attorneys fees and expenses totaling $26,686.95[4] incurred in defending against the General Counsel's allegations, is sought.

On August 20, 1982, the General Counsel filed a Motion to Dismiss Application for an Award or Fees and Expenses under the Equal Access to Justice Act, contending that: (1) General Counsel's position in the litigation was substantially justified notwithstanding the ultimate dismissal of its allegations against Applicant; (2) Applicant is not entitled to expenses incurred prior to October 1, 1981, the effective date of EAJA; (3) Applicant is not entitled to expenses incurred prior to the issuance of complaint; (4) the application is deficient in that it contains no itemization of expenses incurred solely in connection with the unfair labor practice complaint proceeding; and, (5) Applicant is not entitled to expenses incurred in the preparation of its EAJA Application. Applicant filed a response to the Motion to Dismiss on September 8, 1982.

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[4] As amended by Applicant's Response to General Counsel's Motion to Dismiss.

The Substantial Justification Questions

Section 504(a)(1) of EAJA provides that an award shall be made to a prevailing party unless "the position of the agency as a party to the proceeding was substantially justified or.... special circumstances make an award unjust." The burden of establishing substantial justification is on the government and the test of whether or not governmental action is substantially justified is one of reasonablesness. The government, to defeat an award, must establish that its position had a reasonable basis in fact and law. However, the fact that the government lost its case does not give rise to any presumption that its position was unreasonable and the "substantially justified" standard does not "require the Government to establish that its decision to litigate was based on a substantial probability of prevailing."[5] Moreover, as the Board has reoently pointed out, the government's position might still be deemed reasonble in fact and law notwithstanding that General Counsel failed to establish a prima facie case.[6]

General Counsel's consolidated complaints alleged that Iowa Parcel Service, Inc.(herein called IPS), William K. Walker, and the Applicant, as alter egos and as a single employer, violated Section 8(a)(1),(3), and (5) of the Act by locking out and discharging the IPS employees in Des Moines, Iowa, closing the Des Moines facility and transferring some of the IPS operations to Applicant while failing and refusing to continue in effect the collective-bargaining agreement which existed between IPS and General Team and Truck Drivers. Helpers and Warehousemen, Local Union No. 90, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. It further alleged that as alter egos and a single employer, these employers closed their Omaha, Nebraska facility, transferred the work of the employees of that facility to the Applicant, discharged the Omaha employees and failed and refused to recognize and bargain with General Driver & Helpers Union, Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. in violation of Sections 8(a)(1),(3) and (5) of the Act. IPS and Walker did not respond to the complaints' allegations. No answers were filed by them, no representative appeared on their behalf at the hearing held on January 11-14, 1982, and no defense was proffered. Based upon the uncontroverted allegations of the complaints and the record as developed by the General Counsel and the Applicant herein, I found that IPS and Walker had locked out the Des Moines and Omaha employees in violation of Section 8(a)(3),"permitted or encouraged the transfer of a portion of bargaining unit work to [the Applicant] without notice to or bargaining with the Union" in violation of Section 8(a)(5), and further violated Section 8(a)(5) by completely abrogating its collective-bargaining agreement with Local 90. I recommended dismissal of the complaint allegations alleging that IPS had violated Section 8(a)(3) and Section 8(a)(5) by its discharge of employees on April 14,1981, noting that the record had conclusively established that IPS and Walker had gone completely out of business on that date.[7] I further found that the evidence, "while warranting grave suspicion," failed to establish that the Applicant was the alter ego of, or a single employer with, IPS and Walker and recommended that the complaints' allegations, insofar as they pertained to the Applicant, be dismissed. No excebtions to my Decision and recommended Order were filed and my findings, conclusions, and recommended Orders were adopted by the Board.

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[5] S. Rep. No. 96-253, 96 Cong., 1st Sess. 6-7, 14-15 (1979); H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 10-11 (1980); Spencer v. N.L.R.B., ____ F.Supp. ____, 111 LRRM 2065, 2066 (D.C., 1982)

[6] See Enerhaul, Inc.,263 NLRB No.121 (1982)

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[7] First National Maintenance Corporation v. N.L.R.B., 452 U.S. 666 (1981) Textile Workers Union of America v. Darlington Manufacturing Co., 380 U.S.263 (1965).

In support of its contention that the General Counsel's allegations against it did not possess a reasonable basis in law and fact, the Applicant asserted, in its Application and in Response to the General Counsel's Motion to Dismiss, the following: (1) General Counsel issued its complaint alleging that the Applicant was an alter ego of IPS and Walker within a week after the filing of amended charges naming, for the first time, the Applicant as a party respondent, without attempting to interview or obtain affidavits from Applicant's officers or agents in the investigation of those amended charges naming, for the first time, the Applicant as a party respondent, without attempting to interview or obtain affidavits from Applicant's officers or agents in the investigation of those amended charges; (2) Applicant submitted a detailed statement of its factual and legal position to the General Counsel shortly after the issuance of the complaint in Case No. 18-CA-7146 and 7 months prior to the hearing herein, wherein it indicated its willingness to cooperate in any investigation of the charges; (3) no response to its offer of cooperation was made by the General Counsel; (4) General Counsel had in its possession or available to it public and other documents, including decisions of the Iowa Transportation Regulation Board and orders of that agency and the Interstate Commerce Commission, establishing the independence of Applicant from IPS and Walker; and, (5) the evidence possessed by the General Counsel and introduced at the hearing was insufficient, "as a matter of law," ...to establish alter ego, single employer or disguised continuation status." In regard to the latter contention, the Applicant argues that the legal prerequisites to establish such status, particularly "substantially identical owership, management, operations, facilities and equipment, customers and control of labor relations" are settled and well established in Board and Court decisions. General Counsel contends that the case it presented involved bona fide credibility issues warranting a hearing, including evidence from which I could have inferred that the Applicant "was created as a disguised continuance of IPS as part of an unlawful scheme," and presented "in good faith a close question of law or fact" which would bar the granting of an award.[8]

General Counsel did not dispute the Applicant's contention that it undertook no investigation wherein it sought to ascertain evidence or positions from the Applicant either before or after issuance of the complaint. Neither did General Counsel offer any explanation for its failure to conduct such an investigation. On the state of this record, then, I am compelled to accept the Applicant's contentions in this regard. While this failure to pursue all reasonable avenues of investigation prior to litigation is regrettable, contrary to the Board's Regulations (Sec.101.4) and the instructions contained in the General Counsel's Case Handling Manual (Sec. 10056,4 and 10056.5) and certainly not to be condoned, I must conclude that the evidence which General Counsel had in its possession justified its issuance of the complaint against the Applicant as well as IPS and Walker and warranted litigation. Thus, General Counsel had evidence of, and established, the following: the Applicant was formed by two high ranking and long term managerial employees of IPS Sternberg and McElroy; Sternberg had been listed as a vice president of IPS in an IPS annual report to the Iowa Department of Transportation; Applicant's formation occurred while IPS was still in business, with Walker's blessings; Walker provided the initial financing for the Applicant with unsecured and initially undocumented no-interest loans; Walker had expressed an attitude toward his unionized employees from which one could conclude that he would have gone to almost any length to achieve his objectives in regard to them; the Applicant solicited certain of IPS' customers for their business, again while IPS was still in business and with Walker's knowledge and consent; the Applicant was engaged in an enterprise identical in type if not in scope to a portion of IPS' operations; the Applicant hired IPS' night supervisor, Clark, as its operations manager and Clark did the Applicant's hiring prior to the termination of IPS' business operations; the Applicant avoided hiring any of the former IPS employees; the Applicant contracted with

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[8] 126 Cong. Rec. H10226 (Daily Ed. October 1, 1980), the remarks of Rep. Neal Smith, Chairman of the Committee on Small Business.

IPS' insurance agent for coverage on its operations and there was some evidence from which it appeared that the Applicant initially operated under the IPS insurance policies, the Applicant began its business operations utilizing some equipment from the IPS operations; and, Walker, as well as Sternberg, McElroy and Clark, made statements to others indicating that the Applicant was Walker's company and a only device to hold on to certain pool shipment business until Walker was able to achieve his objectives vis-a-vis the Unions. Additionally, General Counsel adduced evidence which, if credited, would have shown that Sternberg had encouraged and assisted Walker to acquire IPS and that McElroy had told the president of Local 90, long before the advent of the Applicant, that IPS had a plan to start another company. I found it unnecessary to resolve the question of Sternberg's alleged encourgement of Walker's acquisition of IPS and credited McElroy's denial of the latter statement attributed to him.

At the same time, General Counsel possessed or had available to it evidence establishing that while IPS was a multi-million dollar, multi-faceted trucking concern operating approximately 100 vehicles and serving approximately 4800 customers from substantial terminal facilities, the Applicant served only 5 customers with 4 vehicles and grossed only $200,000 in its first year of operation. Documentary evidence also established that the Applicant leased property in its own name and invested a substantial sum (for a company so small) in modifying those premises. Additionally, documentary evidence established that neither Sternberg nor McElroy possessed any financial interests in IPS and that Walker was neither an officer, agent or stockholder of the Applicant. The testimony revealed that neither Sternberg nor McElroy was related to Walker. The evidence, as submitted by the Applicant to General Counsel following issuanoe of complaint and as developed at hearing, established further that while Walker exercised virtual total managerial control over IPS, being involved in all decisions large and small, he exercised no such control over the operations or labor relations policies of the Applicant.

Based upon the foregoing facts, as more fully described in my initial decision, General Counsel argued in the case in chief that Walker had created the Applicant as a "disguised continuance of IPS created to hold the lucative pool distribution portion of the IPS operations until those operations were resumed." General Counsel sought a finding that McElroy and Sternberg did not independently form the Applicant but rather decided to continue it in operation after Walker elected to go out of business. General Counsel pointed, in particular, to the financing provided by Walker, the solicitation of the IPS' customers while IPS was still extant, the Applicant's use of IPS equipment, Walker's animus toward the Union, and the various statements by Walker, McElroy, and

Sternberg which pointed toward a "disguised continuance." The Applicant argued that a finding of alter ego or single employer status was precluded by the absence of evidence of "common or substantiallv identical ownership, common management, common operations, common facilities, common customers, and common control of labor relations..."

As stated in my initial decision herein (slip. op. 16):

> To determine whether one legal entity is the alter ego of another, the Board looks to the ownership, management, business purpose, operation, equipment, customers and supervision of the two businesses. Where some of these listed indicia are 'substantially identical' the Board will find an alter ego status. However, not all of these standards have to be satisfied; centralized control of labor relations or identical corporate ownership is not crucial to the finding of an alter ego. Blake Construction Co., Inc., 245 NLRB 630, 634 (1979). See also Crawford Door Sales Co., Inc.,226 NLRB 1144 (1976). Identical corporate ownership is not the sine qua non of alter ego status; however, the presence of "substantially identical" ownership between the two enterprises is a prerequisite to a conclusion that such status exists. Mortons I.G.A. Foodliner, 240 NLRB 1246, fn.2 (1979); Crawford Door Sales, supra. The term "disguised continuance" is

> another way of describing an alter ego and the legal requirements to establish the former are identical to those required to establish the latter. In Howard Johnson Co. v. The Detroit Joint Board, 17 U.S. 249, 259, fn. 5 (1974) the Supreme stated that alter ego or disguised continuance "cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." See also Marquis Printing Corporation, 213 NLRB 394 (1974).

I found, as previously stated, that the "facts here, while warranting grave suspiciaon, fail to establish alter ego status. The essential element, a substantial identity of ownership,. [is] lacking." The interest free loan, I found, was not enough to establish the necessary ownership connection. The statements by Walker, McElroy, and Sternberg, I found, were probably made in an effort to conceal Walker's true intentions and to blame the Unions for the cessation of his businesses. I further found that there was no evidence of continued managerial control by Walker in the operations of the Applicant.[9]

Notwithstanding the ultimate rejection of the General Counsel's contentions, as briefly summarized above, I must conclude here that General Counsel presented, if not a prima facie case, a case which still had a substantial basis in fact and law. Thus, it was arguable, and I could have inferred, that Walker's financial support of the Applicant, in light of the statements made by the various participants, gave him continued actual control over the Applicant such as would establish alter ego status notwithstanding the absence of other evidence of "substantially identical" ownership. See Big Bear Supermarkets #3, 239 NLRB 179 (1978); Circle T Corporation, 238 NLRB 245 (1978); and, Ramos Ironworks, Inc., 234 NLRB substantial and legitimate basis upon which General Counsel was privileged to argue for a conclusion of alter ego status. See also American Pacific Concrete Pipe Company, Inc., 262 NLRB No. 139, slip. op. 11, (1982) cited by the General Counsel in its motion to dismiss the EAJA application. Therein, the Board found two employers who had "substantially identical business purpose, operations, equipment, and customers" to be alter egos notwithstanding that they "did not...share common ownership; nor, did they, on paper, share common management or supervision." Alter ego status was found in that case based upon actual control exercised by virtue of a lease agreement and involvement bv the first employer in the second employer's labor relations. While that case, too, is factually distinguishable from the instant case, that case and the General Counsel's earlier cited cases establish that General Counsel presented an arguable case and advanced, in good faith, a "novel but credible extension and interpretation of the law." The General Counsel's position was, therefore, substantially justified.[10]

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[9] While my conclusions essentially concurred with those of the Iowa Transportation Regulation Board, they were independently arrived at. The findings and conclusions of such an agency, while admissible before the Board, are not entitled to conclusive weight by either the General Counsel or the Board. See Magic Pan, Inc., 242 NLRB 840 (1979).

Accordingly, I must conclude that the General Counsel's complaint had a reasonable basis in fact and law, was substantially justified, and that an award of fees and expenses is not warranted. I therefore issue the following recommended:

ORDER

General Counsel's Motion to Dismiss Application is granted and the application of Iowa Express Distribution, Inc. for attorneys fees and expenses is dismissed.[11]

Dated: Washington, D.C., October 28, 1982

/s/ Michael O. Miller
Administrative Law Judge

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[10] 10 See S. Rep. 96-253, 96 Cong. 1st Sess., 7; H. Rep. 96-1418, 96 Cong. 2nd Sess., 11.

[11] In view of my disposition of the substantial justification issue, I deemed it unnecessary to reach the additional defenses and arguments raised by the General Counsel in opposition to the application. See Spencer v. NLRB, supra. Supp.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IOWA PARCEL SERVICE, INC.)
and IOWA EXPRESS DISTRIBUTION,)
INC.) Case
)
and)
)
WILLIAM K. WALKER, An Individual and Alter Ego)
)
and)
)
GENERAL TEAM AND TRUCK DRIVERS,)
HELPERS AND WAREHOUSEMEN, LOCAL)
UNION NO. 90, affiliated with)
INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA)
)
and) Case 18 CA 7369
) (formerly
GENERAL DRIVERS & HELPERS) 17-CA-10420)
UNION, LOCAL NO. 554, affiliated with INTERNATIONAL)
BROTHERHOOD OF TEAMSTERS,)
CHAUFFEURS, WAREHOUSEMEN AND)
HELPERS OF AMERICA)

ORDER

On June 2, 1982, Administrative Law Judge Michael O. Miller of the National Labor Relations Board issued his Decision in the above-entitled proceeding and, on the same date, the proceeding was transferred to and continued before the

Board in Washington, D.C. The Administrative Law Judge found that Respondents Iowa Parcel Service, Inc. and William K. Walker, An Individual and Alter Ego, have engaged in certain unfair labor practices, and recommended they take specific action to remedy such unfair labor practices. We further recommended that the complaint to the extent that Respondent Iowa Express Distribution, Inc. committed unfair labor practices dismissed.

No statement of exceptions having been filed with the Board, and the time allowed for such filing having expired,

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board Rule and Regulations, Series 8, as amended, the Board hereby adopts the findings and conclusions of the Administrative Law Judge as contained in his Decision, and orders that the Iowa Parcel Service, Inc., and William K. Walker, An Individual and Alter Ego, their officers, agents, successors and assigns, shall take the action set forth in the recommended Order of the Administrative Law Judge.

IT IS FURTHER ORDERED that the portion of the complaint alleging that Respondent Iowa Express Distribution, Inc. committed unfair labor practices be, and it hereby is, dismissed.

Dated, Washington, D.C., July 9, 1982.

By direction of the Board:

Enid W. Weber

Assistant Executive
Secretary

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IOWA PARCEL SERVICE, INC.)
and IOWA EXPRESS DISTRIBUTION,)
INC.) Case No. 18-CA-7146
)
Respondents,)
)
and)
)
WILLIAM K. WALKER, An Indi-)
vidual and *Alter Ego*)
)
Respondents,)
)
and)
)
GENERAL TEAM AND TRUCK DRIVERS,)
HELPERS AND WAREHOUSEMEN, LOCAL)
UNION NO. 90, affiliated with)
INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS, CHAUFFEURS, WARE-)
HOUSEMEN AND HELPERS OF AMERICA)
)
Charging Party,)
)
and) Case 18 CA 7369
) (formerly
GENERAL DRIVERS & HELPERS) 17-CA-10420)
UNION, LOCAL NO. 554, affil-)
iated with INTERNATIONAL)
BROTHERHOOD OF TEAMSTERS,)
CHAUFFEURS, WAREHOUSEMEN AND)
HELPERS OF AMERICA)
)
Charging Party,)

Robert Sykes, Esq. of Minneapolis, MN, for the General Counsel.
David D. Weinberg, Esq. (*Weinberg and Weinberg*), of Omaha, NE, on behalf of Charging Party, General

Drivers & Helpers Union, Local No. 554.

Neil A. Barrick, Esq., of Des Moines, IA, on behalf of Charging Party, General Team & Truck Drivers Union, Local 90.

John R. Phillips, Esq., and Kathleen A. Reimer, Esq. (Rogers, Phillips and Swanger), of Des Moines, IA, for Respondent Iowa Express Distribution, Inc.[1]

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[1] Counsel for Respondent Iowa Express Distribution, Inc. expressly disclaimed representing either Iowa Parcel Service, Inc. or William K. Walker. No appearance was made on behalf of either of those parties.

DECISION

Statement of the Case

MICHAEL O. MILLER, Administrative Law Judge: These consolidated cases were heard in Des Moines, Iowa on January 11-14, 1982. The charge in Case No. 18-CA-7146 was filed by the General Team and Truck Drivers, Helpers and Warehousemen, Local Union No. 90, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 90, on March 25, 1981 and was amended on May 5, 1981. The complaint in that case was issued by the Regional Director of Region 18 of the National Labor Relations Board, herein called the Board, on behalf of the Board, on May 13, 1981. It alleges that Iowa Parcel Service, Inc., herein called IPS, and Iowa Express Distribution, Inc., herein called IED, as alter egos and a single employer, together with William K. Walker, herein called Walker, as an alter ego of and single employer with IPS, violated Sections 8(a)(1), (3), and (5) of the Act by locking out and discharging the employees at the IPS facility in Des Moines, Iowa, closing that facility, and transferring some of its operations to IED while failing and refusing to continue in effect the collective-bargaining agreement.[2] The charge in Case No. 18-CA-7369 (formerly 17-CA-10420) was filed by General Drivers & Helpers Union, Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 554, on June 15, 1981 and was amended on July 22, 1981. The complaint in that case was issued by the Regional Director of Region 17 of the Board, on behalf of the Board, on July 24, 1981.[3] That complaint similarly alleges an _alter ego_ and single employer relationship between IPS, IED, and Walker, and further alleges that IPS closed its Omaha facility, transferred the work of the employees at that facility to IED, discharged the Omaha facility employees, and failed and refused to recognize and bargain with Local 554, the certified collective-bargaining representative of the IPS Omaha facility employees, in violation of Sections 8(a)(1), (3), and (5) of the Act.

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[2] The question of whether these and subsequent charges and complaints were effectively served upon IPS and Walker are discussed _infra_.

[3] All dates hereinafter are 1981 unless otherwise specified.

No answer was filed by IPS or Walker. IEF's timely filed answer denies the existence of any alter ego relationship between it and IPS and denies the substantive allegations of the complaint.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue orally. General Counsel and Respondent IED have filed briefs which have been carefully considered.

Based upon the entire record,[4] including my observation of the witnesses and their demeanor, I make the following:

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[4] IED's unopposed motion to correct the transcript is granted. General Counsel's unopposed motion to correct the transcript is similarly granted; that correction (addition of the name Levitz Moving and Storage Co.) should be made at page 231, line 2, rather than page 232, line 2, as requested in the motion.

Finding of Fact

I. Jurisdiction and Labor Organization Status--Preliminary Conclusions of Law

The complaints allege, and the record establishes, that IPS was, at all times material herein, an Iowa corporation[5] with offices and terminals in Des Moines, Iowa and Omaha, Nebraska, from which it was engaged as a common carrier in the intrastate and interstate cartage and delivery of freight and other commodities. The record further establishes that during the calendar year ending December 31, 1980, a representative period, IPS derived gross revenues in excess of $50,000 for the transportation of freight and commodities from within the State of Iowa directly to points outside that State and similarly derived gross revenues in excess of

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[5] Joint Exhibit No. 21 indicates that IPS' certificate of incorporation was cancelled on November 23, 1981, by the Secretary of State for the State of Iowa, for failure to timely file an annual report.

$50,000 for transportation of freight and commodities from outside that State to points within the State.

The complaints allege, and IED admits, that at all times since March 23, 1981, IED has been an Iowa corporation with an office and terminal in Des Moines, Iowa from which it has been engaged as a contract carrier in the intrastate and interstate cartage and delivery of freight and other commodities. Since March 23, 1981, IED has derived gross revenues in excess of $50,000 for the transportation of freight and commodities from within the State of Iowa directly to points located outside that State and has derived gross revenues in excess of $50,000 for the transportation of freight and commodities from outside the State of Iowa directly to points located within that State.

The complaints allege, and I find and conclude that IPS and IED are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The complaints allege, IED admits, and the record establishes that Local 90 and Local 554 are labor organizations within the meaning of Section 2(5) of the Act.

II. Service of Charges and Complaints

All of the charges, amended charges, complaints and notices of hearing were timely served upon and received by Respondent IED. However, because Walker closed IPS and all of his other enterprises and disappeared,[6] as discussed in greater detail *infra*, questions arise as to the sufficiency of General Counsel's efforts to make service upon Walker and IPS.[7] General Counsel contends that proper service was effectuated by completed service upon

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[6] Neither the General Counsel, Walker's former business associates McElroy and Sternberg, nor his creditors, including Bankers Trust Company of Des Moines and the Internal Revenue Service, knew where Walker had gone. It was speculated, at hearing, that he had removed himself either to Great Britain or Brazil.

[7] The issue was posed by counsel for IED, concerned that treatment of the complaint allegations against IPS as admitted because of the absence of any answers thereto would adversely affect the rights of IED.

IED, Walker and IPS' alleged alter ego. See Sturdevant Roofing Company, 238 NLRB 186, 188 (1978), aff'd 636 F.2d 271 (C.A. 10, 1980). However, as I have concluded infra, that no alter ego relationship existed, the record must be closely examined to determine the efficacy of General Counsel's efforts to provide Walker and IPS with sufficient notice of the proceedings against them so that it might be said that they were afforded due process of law, that is, an opportunity to appear and be heard. See 2 Am Jur 2d, Administrative Law, § 359, 360 and 62 Am Jur 2d, Process, § 2, 3.

The record establishes that the original charge in Case No. 18-CA-7146 was served upon IPS on March 27 and was received by it on March 30. The amended charge in that case, which named IPS, Walker, and IED, was mailed by certified mail to IPS at its Des Moines terminal on Delaware Avenue, to Walker individually at 639 West 55th Street, Kansas City, Missouri, and to Walker's attention at Merchants Delivery

Company, IPS's parent company (owned in its entirety by Walker), at 1212 East 19th Street, Kansas Citv, Missouri, on May 6. Delivery of the charge served upon Walker at the West 55th Street address is evidenced by a certified mail receipt singed by a Jennifer Walker on May 8. The record does not further establish Jennifer Walker's identity. The record contains no evidence of delivery or of the return of the copies served upon IPS or Walker at Merchants Delivery. The complaint and notice of hearing in 18-CA-7146 was mailed on May 13 by certified mail, to the same parties and addresses as the amended charge had been mailed. The record contains a return receipt from the service on Merchants Delivery, signed for by a Robert Young, who described himself thereon as the "authorized agent." The record contains no other evidence establishing the identity or role of Robert Young. The envelope containing the complaint addressed to Walker at his West 55th Street address in Kansas City was returned marked "No Response, Notice left 5/15/81 . . . Unclaimed . . . Return to Sender." Similarly the envelope addressed to Walker and IPS at the Des Moines terminal was returned unclaimed.

The original charge in Case No. 17-CA-10420 (subsequently designated as 18-CA-7369) was served upon IPS at its Omaha, Nebraska terminal by regular mail on June 16 (2 months after the closure of that terminal). The amended charge, complaint and notice of hearing in that case were served by regular mail upon both IPS (at its Omaha terminal) and Walker (at his West 55th Street, Kansas City address.) Certified mail service was attempted upon Walker at that same address. The Postal Service forwarded the latter envelope to Walker's forwarding address in Shawnee Mission, Kansas from which it was returned, marked "Refused." Attempted service by certified mail upon IPS at the Omaha terminal was returned marked "Moved-Authorized time for forwarding expired" and "Return to Sender-Not deliverable as addressed-unable to forward." An attempt was also made to serve IPS, to the attention of Harold Sternberg, IPS' executive director until March 23, at the Des Moines terminal. That envelope was also returned to the sender, marked "Refused." At the time of that attempted service, that terminal was no longer occupied by IPS; at least three other employers were utilizing that space. The order consolidating cases and notice of hearing was sent by certified mail to IPS at both the Des Moines and Omaha terminals and to Walker at both West 55th Street and Merchants Delivery. All were returned with notations by the Postal Service that the addressee had moved and left no address, was unknown, or that the envelope was unforwardable. General Counsel represented, on the record, that efforts to make personal service upon Walker and IPS had been unsuccessfully attempted.

Section 11(4) of the Act and Section 102.111 of the Board's Rules and Regulations provide, inter alia, for service of charges and complaints by registered or certified mail and for proof of service by the postal receipt.

In Pasco Packing Company, 115 NLRB 437 (1956), the complaint and notice of hearing and an order rescheduling that hearing were served on the respondent by registered mail; the documents were returned to the Board, marked "Refused." The Board, finding that service had been effectuated, agreed with the then Trial Examiner's statement that it was a "reasonable [assumption] that all Congress contemplated when authorizing the effectuation of service of process by registered mail was that the Post Office Department tender the registered process to the addressee." The Board went on to state:

> Manifestly if Respondent, by its wilful refusal to accept registered mail, clearly labeled as originating in the Board's Regional Office, can thwart service of process, and require the Regional Director to effectuate service of process by one of the more cumbersome alternative methods listed in Section 11(4) of the Act, then the provision authorizing service of process by registered mail becomes a dead letter with respect to this Respondent and all other parties who may act accordingly. Such a result would clearly contravene

> congressional intent and result in the intolerable situation of rewarding recalcitrant respondents engaged in studied attempts to obstruct the orderly administration of the Act.[8]

More recently, the Board, in McGregor Building Services, 234 NLRB 1054 (1978), concluded that service had been properly effectuated where the complaint was served by registered mail, that document was returned marked "unclaimed," a Board agent unsuccessfully attempted to make personal service at respondent's place of business, and a copy of the complaint was then sent to respondent by regular mail, even though no answer to the complaint or response to a subsequent notice to show case was ever received.

Based upon the foregoing, I am satisfied that service herein was adequately effectuated and that any defects in that service were occasioned by Respondent Walker and IPS' attempts to avoid their legal obligations. Thus, I note that the original charge in Case No. 18-CA-7146 was served on IPS, the amended charge was received at Walker's West 55th Street, Kansas City address on May 8, and the attempted service of the complaint and notice of hearing in that case upon Walker at that same address only five days later went unclaimed, notwithstanding that the Postal Service had left a notice of the certified mail at that location. Moreover, a copy of the complaint was delivered to Walker's attention at Merchants Delivery Service, and was signed for by an individual representing himself to be an "authorized agent." Absent any contrary evidence, one must presume that the Postal Service representative properly delivered that mail and that the individual representing himself to be Walker's agent in fact possessed the requisite authority.

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[8] The Board noted additionally that the Respondent had been represented by an attorney and that the process involved was served upon that attorney by regular mail, was received by him, and was acted on in Respondent's behalf. Thus, the Board concluded that the Respondent therein had adequate and actual notice of the complaint's allegations. The Board stated, "Respondent cannot justly complain if service of process on its attorney is made the equivalent of that which its acts have made impossible."

Similarly, I find adequate and effective service of the charges and complaint in Case No. 17-CA-10420 (18-CA-7369). While there is neither a return receipt nor a returned envelope representing the attempted service of this charge on IPS at its terminal in Des Moines, there is evidence establishing regular mail service to IPS in Omaha. Moreover, the first amended charge, the complaint and the notice of hearing were mailed to Walker at the West 55th Street, Kansas City address from which they were forwarded (presumably pursuant to the addressee's instructions) to an address in Shawnee Mission, Kansas. Attempted service at that address was "Refused." The attempted service on IPS at the Omaha terminal was prevented by IPS' failure to authorize forwarding. In Local Union 49, Sheet Metal Workers (Drive-Miller Plumbing & Heating Corp.) 124 NLRB 888 (1959) the Board's attempted service by registered mail was refused by a respondent which had a policy of not picking up such mail even after notification by the Post Office. The Board stated, page 890, "Wilful and negligent refusal or failure to receive or call for registered or certified mail, obviously can not serve to defeat the purposes of the Act." Constructive service sufficient to satisfy the requirements of Section 10(b) of the Act was found. To the same effect, see Garden Fashions, Inc., 231 NLRB 72 (1977). The principle expressed in Drive-Miller and Garden Fashions is applicable here.

III. The Alleged Unfair Labor Practices[9]

A. William K. Walker and IPS

William K. Walker was the sole stockholder and president of a number of corporations in the trucking industry, including Merchants Delivery Company, a Missouri corporation headquartered in Kansas City, Missouri (hereinafter called Merchants). In March of 1978, Merchants acquired 100% of the stock of IPS. IPS was, and continued through April 14, 1981, to be a common carrier[10] serving 10 states in the Midwest with its main office and terminal in Des Moines, Iowa and other terminals in Waterloo, Iowa and Omaha, Nebraska. IPS had an annual gross volume of business during calendar year 1980 of approximately $7,300,000.[11] IPS served every town in Iowa, approximately 1000.

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[9] The facts as found herein are based on the largely uncontroverted testimony of the witnesses proffered by both the General Counsel and IED. Additionally, they are based upon the allegations of the complaints against IPS and Walker, which allegations stand as admitted in the absence of any answers disputing said allegations (McGregor Building Services, supra), at least to the extent that such admissions are consistent with record testimony and exhibits. In view of my ultimate conclusion herein that no alter ego relationship existed between IPS and IED, the admissions which arise by operation of law from IPS and Walker's failure to file answers are without legal effect upon IED.

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[10] The Interstate Commerce Act, 49 U.S.C. Sec. 303(14) defines a "common carrier by motor vehicle" as "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes. . ." Harold Sternberg, IPS' executive director and subsequently president of IED, further defined a common carrier as one who was required to provide service to all who requested same.

[11] Walker boasted that his various business enterprises grossed approximately $20 million per year.

IPS' Des Moines terminal was housed in a building approximately the size of a football field. It had 50 truck bays, and facilities and employees for the repair and cleaning of its vehicles. Within the building was a sophisticated automated conveyor system for moving packages to and from the trucks. Outside was a parking lot of 4 or 5 acres. IPS operated approximately 80 radio-equipped vehicles; it owned 24 single axle straight trucks, step-vans and pick-ups for city use and 36 single and trandem axle vans for use over-the-road. Additionally, it leased approximately 23 single and tandem axle tractors and straight trucks for over-the-road use.

IPS served approximately 4800 active customers. Some of the goods it delivered were goods which it had picked up from t-ose customers; some were goods delivered to its terminals by other carriers. IPS delivered to its customers within its own operating area either directly or through a network of approximately 100 independent agents who would receive the goods from IPS and then make local deliveries. The independent agents also received goods from their customers to be picked and shipped by IPS. IPS budgeted approximately $150,000 a month in expenses related to the independent agents. IPS interlined with other common carriers, receiving goods from them for delivery and bringing them goods from its own customers to be delivered by them.

Included among IPS' 4800 customers were approximately 35 "pool" customers. Pool customers shipped, either by their own trucks or common carriers, fairly large quantities of goods to a carrier who would then distribute them to that pool customer's facilities, stores, or sales agents. Included among IPS' pool customers were General Motors, Chrysler, Ford, Maremont, Amway, Avon, Shaklee Corporation, K-Mart, Meldisco Shoes, Target Stores, Fingerhut and Federal Warehouse. IPS derived as much as

$4,000 per week in gross revenues from some of these customers, like Avon and Shaklee. Its annual gross from pool shipment customers was approximately $2,000,000. IPS delivered the pool customers' merchandise either directly to their stores, their automobile dealerships, or, where many small distributors were involved, such as those selling Shaklee and Avon products, IPS would make delivery to agents in or near the distributors' communities.

For many years antedating the arrival of Walker, the IPS drivers and warehouse workers were represented by Local 90.[12] There were between 90 and 100 employees in the unit. The collective-bargaining agreement in effect at the material times herein had a term of April 1, 1979 through March 31, 1982. Until mid-1980,

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[12] The appropriate collective-bargaining unit consisted of:
All drivers and warehouse employees, including citymen, road drivers, and dockmen; excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act, as amended.

IPS also employed between 15 and 20 clerical employees at its Des Moines facility who were represented by Teamsters Local 387.[13]

Harold Sternberg had been employed by IPS for approximately 20 years prior to Walker's acquisition of the company and had considerable experience in the trucking industry even before his employment at IPS. In 1978, he was IPS' sales manager; Walker made him its executive director. His duties, essentially concerned with the acquisition and retention of customers, remained unchanged. At some point around 1979, Sternberg learned that he had been referred to as IPS' vice president. He was so listed in IPS' annual report to the Iowa Department of Transportation for the year ending December 31, 1979, which he signed. He attended no meetings and performed no other functions as an officer or director. He was salaried, at approximately $600 per week, owned no interest in IPS or any of Walker's other enterprises, and was not related to Walker.[14]

Randy McElroy had been employed in various capacities by IPS since 1965. He was its terminal manager when Walker took over and became operations manager in 1980. As such, he was in charge of the terminal, including the dock and the drivers. Like Sternberg, McElroy owned no interest in IPS or any of the other Walker-owned corporations and he was not related to Walker.

Despite the titles, positions, and roles of both Sternberg and McElroy, Walker ran and controlled IPS. This is undisputed. Walker was involved in all major decisions, negotiated or controlled the negotiations for the collective bargaining agreements, participated in all grievance resolutions involving $25 or more dollars, solely determined and set all labor relations policy and in every respect supervised the operations of IPS down to relatively minor details. He was present at the IPS terminal for several days out of almost every week.

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[14] Testimony was offered to establish that Sternberg had claimed a role in encouraging and assisting Walker to acquire IPS. Sternberg denied having any such role. Resolution of this limited credibility conflict would add nothing to the disposition of this matter.

Until November 24, 1980, IPS had utilized the services of an independent agent, Mid-West Mail, to deliver packages consigned to it for the Omaha, Nebraska area. On that date, IPS opened its own Omaha terminal and ceased doing business with Mid-West Mail. The five employees of that new terminal, including Glenn Hetrick, the immediate supervisor thereof, were hired by Sternberg. Thereafter, whatever little outside supervision was required over that facility was provided by Sternberg. Vehicles for the Omaha operation came from Merchants in Kansas City. The Omaha facility had approximately 100 customers, the largest of whom were the Target, K-Mart, and Sears retail stores to whom regular deliveries were made. Pick-ups and deliveries were made at the premises of other customers as well. The

Omaha terminal received about a truck load of packages from Des Moines daily and shipped somewhat less back each day.

On March 9, 1981, Local 554 filed a petition for certification, Case No. 17-CA-9219, seeking to represent IPS' Omaha employees. An agreement, providing for an election among those employees[15] was signed by McElroy, with Walker's approval, on April 10. It was approved by the Regional Director on April 14 and the election was held on April 17. As discussed in greater detail infra, the Omaha terminal was shut down because of the "management strike" called by Walker on March 23, prior to the time that McElroy signed the agreement; McElroy testified that he informed the Board agent about that strike when he signed the agreement. IPS was permanently closed as of April 14 and no management representative was present at the election. The Board was informed, by telegram to its resident office in Des Moines, dated April 14, that IPS was ceasing its operations. Apparently, there was no direct notice to Region 17, under whose auspices the election was being conducted. The Union won the election by a vote of 3 to 0. Certification issued on April 30. Local 554 wrote to Sternberg at IPS on May 18, requesting bargaining. Its letter was returned unclaimed. There were no further attempts made to communicate the bargaining demand.

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[15] The appropriate collective bargaining unit was:
All full-time and regular part-time sorters, preloaders, loaders, packaging route drivers and feeder drivers employed by Iowa Parcel Service at its facility located at 4512 South 88th Street, Omaha, Nebraska; excluding all office clerical employees, guards, watchmen, and all professional and supervisory employees as defined in the Act.

B. Walker's Attitude and Concerns

Walker's attitude toward employees in general and his own unionized employees in particular is reflected in his characterization of the Union and the employees as dinosaurs driving themselves toward extinction by eating up all of the trees (i.e., his money). In July of 1980, Walker addressed a memorandum to

McElroy wherein he addressed the problem of the increased cost of labor called for in the collective bargaining agreement.[16] He projected the wage increase's cost at over $1900 per week and stated, "We can not live with that and must adjust the dinosaur population accordingly. Adjustment is a wasted exercise if we count on cooperation from the adjustees. . ." He went on to propose changes and elimination of routes so as to reduce the working complement and stated the following:

> Thus, the first rule of dinosaurology: "As each dinosaur requires more trees per hour/day, we will preserve the forest by thinning the herd" Second rule: "Unless you move the trees by replanting elsewhere, you can not thin the herd fast enough to replace the forest."

He further described the dinosaurs as having "in two short years. . .stolen our work, our achievement, our effort and given us nothing in return." Thus, he gave the employees no credit for their contributions to the enterprise and accepted no responsibility for the terms of the contract he negotiated and signed or for other factors contributing to the decline in profits.

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[16] His memorandum dealt with a wage increase of approximately 60 cents per hour due to take effect in October 1980. The collective bargaining agreement provided for a cost-of-living adjustment at that time. It further provided for an increase of approximatelv $.53 per hour in wages, health and welfare benefits and pension contributions, plus a cost-of-living adjustment, in April of 1981.

Leslie A. Turner, president of Local 90 and its assistant business agent, claimed to have had a conversation with McElrov sometime during the summer of 1980. In that conversation, McElroy allegedly stated that IPS had a plan A and a plan B and that plan B involved starting another company. McElroy denied ever making such statements to Turner. McElroy's denial was credibly offered. Turner, on the other hand, had not included any mention of this alleged conversation in his investigative affidavit, had little recollection of the details, and acknowledged that the incident was "vague" in his mind, that the statement had gone over his head at the time and had not really been thought about. Accordingly, I credit McElroy's denial.

Glenn Hetrick, the supervisor hired bv Sternberg to oversee the Omaha terminal, testified that in December of 1980 Sternberg had told him something to the effect that there might be a strike during the Spring which would affect the whole IPS system. Sternberg denied making any such statement to Hetrick. As it appears that Walker's plans for a "management strike" were not made known to Sternberg and McElroy until February, I conclude that this statement, if made at all, was not made as early as December 1980.

IPS suffered a net loss of $12,740 during calendar year 1980. In January, its revenue was $493,000; its loss was $126,600. As noted, IPS' collective bargaining agreement with Local 90 provided for wage and benefit increases to become effective on April 1.

Beginning in early February, Walker discussed with McElroy and Sternberg his plans to call a "management strike" sometime around the beginning of April.[17] Walker stated, in the context of these plans, that he was not going to continue losing money at IPS. He told McElroy that he intended to teach the drivers a lesson, to show them that they worked for him and not for Local 90. Notwithstanding his concerns, Walker did not seek any concessions from Local 90 prior to March 23.[18]

C. The "Management Strike"

Sometime in early March, Walker told McElroy that he had decided to call his "management strike" on March 23. He instructed McElroy that the freight on the dock was to be moved to two other (unrelated) trucking companies over the weekend preceding March 23; he further instructed McElroy not to tell anyone of the plans prior to that date. McElroy was told to maintain the theme that the lockout (as it is more appropriately described) was not going to be permanent, that the employees would go back to work. Walker similarly told Sternberg, several days prior to March 23, that that would be the day that he wanted Sternberg to lock the gates and tell everyone that there was a strike.

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[17] Walker was fond of quoting from the writings of the late Ayn Rand and it is purportedly from her novel, Atlas Shrugged, that he derived his concept of a management strike.

[18] I take judicial notice of the well publicized fact that throughout 1981 and 1982, various unions, including the International Brotherhood of Teamsters, engaged in collective bargaining and agreed to mid-term concessions and give-backs in order to preserve jobs in the face of adverse economic conditions.

On Monday, March 23, the gates at IPS' Des Moines terminal were locked. Employees, union stewards and union officers arriving at the plant were told that management was on strike and would be meeting with union representatives later that day. Walker told employee James Caley that they were taking "an unscheduled vacation."

Pursuant to Walker's instruction, Sternberg called Glenn Hetrick at the Omaha terminal and informed him of the lockout. He instructed

Hetrick to deliver everything that they had on the dock, not to make any pickups, and to tell his employees that IPS was on strike. Hetrick complied with these instructions.

An investigation of the lockout was conducted by the Iowa Department of Transportation (DOT) on March 25. Its agent spoke with McElroy on that date and was told that the facility was closed down, that management was meeting with the Union on the following day, and they hoped that they would be able to resume operations within two or three days. On March 31, the Iowa DOT, Transportation Regulation Board, ordered IPS to resume operations until such time as the question of whether its operating authority should be revoked was resolved. McElroy communicated the Iowa Board's order to Walker and was told to do "nothing." Walker's response remained the same even after the Iowa District Court issued a temporary injunction on April 10.

D. The Birth of IED

According to their own testimony, Sternberg and McElroy decided to go into business for themselves when they learned from Walker of the likelihood that IPS would not continue in business. Thus, they testified that they had a meeting in early February wherein Walker went over IPS' recent losses, stated his unhappiness with the additional labor costs that would take effect on April 1, said something to the effect that he could foresee no improvement in the future, and claimed that he was going to do something on or about April 1 in the nature of closing down or going on strike. Walker assured Sternberg and McElroy that thev would be taken care of with severance pay in the nature of $20,000 or more each. Shortly after this meeting, Sternberg and McElroy discussed the formation of their own trucking company to handle pool distribution work. Walker, they said, did not participate in these discussions but encouraged them when they told him of their plans. In addition to his encouragement, Walker promised them a interest free loan, in lieu of severance pay, to get them started. Over the course of the following month and one-half, Walker wrote checks to Sternberg and McElroy totaling $25,800; no note or loan agreement was executed prior to furnishing these funds. Walker also gave them written permission to use the name, "Iowa Express Distribution, Inc.," a name very similar to that of Iowa Express Delivery, a Walker owned holding company.

On February 27, Sternberg and McElroy created IED. Its certificate of incorporation is dated March 4 and lists the directors and incorporators as Sternberg and McElroy. Its registered agent is the attorney who handled their incorporation. That attorney was not Walker's attorney. Walker is not listed as an officer, agent, or stockholder of IED.

Sternberg and McElroy contacted a real estate brokerage firm and, between March 5 and March 10, were shown several facilities suitable for a freight business. They selected and leased 7500 square feet of warehouse space in a building located approximately 13 miles from the IPS facility. The lease, accepted on March 13 and signed on March 17, in the name of IED, was for five years at an annual rental of approximately $23,000. Using funds advanced by Walker, IED put down a security deposit of approximately $3800 as the first and last months rent on that lease. Immediately after taking possession, they added approximately $7000 worth of improvements to the warehouse in the form of additional overhead doors.

With Walker's knowledge and without any objection from him, Sternberg, while still on the IPS payroll, began to solicit some of the IPS pool distribution customers for their business on behalf of IED. Those he solicited were told that IPS was going out of business as of April 1. Sternberg did not solicit all of the IPS pool distribution customers. Since he and McElroy intended to limit the size of their operation to four vehicles so as not to over-extend themselves financially, Sternberg did not solicit those customers whose shipments would require them to use independent agents, as IPS had, or those whose volume of business or package sizes (like General Motors) would preclude them from providing adequate service. Those customers whom Sternberg successfully solicited, K-Mart, Maremont, Federal Warehouse, and Meldisco, signed statements supporting IED's application to the Interstate Commerce Commission (ICC) for temporary authority to operate as a contract carrier.[19] These supporting statements were signed between March 1 and March 18 and each indicates that the signator is aware that Iowa Parcel Service will cease operations about April 1. All of these except Federal

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[19] The authority to operate as a contract carrier is substantially more limited than that given to a common carrier. See Interstate Commerce Act, 49 U.S.C. Sec. 303(15) which defines a contract carrier as being authorized to transport property "under continuing contracts with one person or a limited number of persons. . ."

Warehouse had been active customers of IPS until the March 23 lockout. Federal Warehouse had been an IPS customer until sometime in February.[20] IED received temporary and then permanent authority to operate as a contract carrier. It did not seek the more lucrative (and more difficult to achieve) common carrier status possessed by IPS.

IED acquired insurance for its operations through the agent who had been serving Walker and IPS. Its annual premium was approximately $8800: a down payment of $3200 was paid[21]

IED hired Tim Clark, a former IPS night supervisor, to be its operations manager. Clark hired one dock worker and five drivers for IED in the period prior to March 23, interviewing them on his own time while he was still employed by IPS. The drivers were referred to IED by the State unemployment office. No IPS drivers or dock workers were hired by IED.[22]

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[20] Sternberg also submitted an application to operate as a contract carrier under contract with Target Stores. That application, with a supporting statement signed by Sternberg in the name of a Jim Jacobs, was withdrawn at Jacobs' request because Sternberg had not been authorized to sign for him. The record does not further explain this matter.

[21] Communications from the insurance agent bear, in what Sternberg and McElroy claim to be the agent's error, policy numbers and dates from policies issued to IPS or Walker.

IED began its operations on Monday, March 23, when IPS locked out. None of the freight at IPS was transferred to or delivered by IED.

F. Meetings and Statements

On the morning of March 23, Walker prepared, in handwritten form, the list of "concessions" he purportedly sought from Local 90. According to McElroy however, the list was a sham; Walker told him that he had included items, such as his own pension fund in lieu of the Union's which the Union had forcefully rejected in prior negotiations, which he knew it would be unlikely to accept now.

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[22] At the time that the IED employees were hired, the IPS employees were neither locked-out nor discharged. McElroy testified that the IPS employees were not offered employment at IED because they were still employed by IPS when IED was taking applications; he further testified that IED had been advised by its legal counsel not to hire them. Sternberg testified, somewhat implausibly, that none of the IPS employees were offered jobs at IED because none of them had work habits which IED wanted from its employees. He denied that their work attitudes, which he characterized as having built up to the point where the employees were running the company, had anything to do with their union membership.

Walker and McElroy[23] met with representatives of Local 90 on the afternoon of March 23. He presented his "concessions" list, implied that the employees were being overpaid[24] and indicated that these concessions were what he needed to keep IPS running. The Local 90 representatives reviewed his demands and told Walker that thev would negotiate concessions with him after he put the employees back to work. Walker, however, refused, insisting that he wanted to hurt the employees, to make them go at least one week without a paycheck so as to "get their attention" and show them that he was serious.

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[23] Sternberg did not attend any of the meetings with Local 90.

[24] Walker had made similar statements in his "dinosaur" memorandum.

A second meeting was held on March 26; Local 90 unsuccessfully repeated its willingness to negotiate concessions after Walker reinstated the locked-out employees. During their meeting, Local 90's president, Turner, indicated that the Union knew about his "new company" and asked if Walker was going to make McElroy rich. Walker stated, without McElroy present, "No, that is just a place to take my pool freight until Iowa Parcel opens back up, and then we will bring all of the pool freight back. . ." Similar statements were made in the last meeting, held on April 1 at the offices of the Federal Mediation and Conciliation Service (FMCS). There, again in McElrov's presence, Walker referred to IED as "my other company," and told the Union's representatives to leave it alone. McElroy admitted that Walker made such statements in his presence during these meetings; he further admitted that he did not contradict Walker. He claimed that he was merely following Walker's orders and trying to avoid alienating IED's source of funding.

Notwithstanding that he had told the Union that IED was his device to hold on to the pool shipments, Walker made contrary statements to the press.[25] In two interviews, he denied that IED was his or was connected to IPS. It was, he said, just handling some of the former IPS customers. He was also quoted as stating that he had locked out the employees because he could not live with the labor agreement. The issue, he said, was bigger than IPS: "It is an industry problem and we may be the first one dealing with it." "Strikes [he said] have always been associated with men of labor and this is the first one of men of brain. . .an elitist attitude but. . .a new concept." His "management strike," he guaranteed, would be over within 10 days "because the ball is

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[25] Walker was eager to be interviewed for the television news broadcasts.

. . .in my court, not theirs. So if I decide to play ball, they [the Union] would play ball."

Walker was not the only person making statements about IED. IPS dock worker Steele spoke with McElroy several days after the lockout and asked whether Walker owned IED. McElroy said that he did. He also told James Caley, an IPS dock supervisor, that IED was just a device to hold the pool shipments intact, so that IPS could recover them when it resumed operations.[26] Similar statements were attributed to Sternberg and Tim Clark, IED's operations manager, and stand uncontradicted.

Notwithstanding these statements by Walker in McElroy's presence and the statements attributed to them, McElroy and Sternberg denied that

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[26] McElroy denied telling any IPS drivers or union representatives that Walker was involved with IED. He did not specifically deny participating in these conversations with Steele and Caley. In view of the absence of any specific denials, and noting that the statements testified to by Steele and Caley were consistent with the statements being made by Walker in McElroy's presence, I find it likely that McElroy made these statements.

IPS was a device for holding IPS' pool shipments. They testified that it was their intention to continue to operate IED as their own business whether or not IPS resumed its operations. There was, they testified, no way that the amount of pool distribution business which IED had could support resumption of IPS. IED had four or five customers which would ultimately yield an annual gross volume of about $200,000. IPS had 35 pool distribution customers and its pool business brossed $2,000,000 annually. Moreover, IED had made no effort to secure the accounts of some of IPS' largest pool customers, such as Avon and Shaklee.

G. IPS' Shutdown and IED's Continued Operations

On April 14, upon Walker's instructions, McElroy sent telegrams to the Iowa DOT and the NLRB announcing the total and permanent cessation of IPS' operations. This was McElroy's first official notice that, as he had believed for some time, IPS would never reopen. He continued in IPS' employ until the end of April, assisting the creditors in wrapping up IPS' affairs; he was paid only until mid-April. Sternberg had left the IPS payroll on March 23.

In late 1979, Walker had borrowed $3,400,000 from Banker's Trust Company in Des Moines for IPS and his other companies. He was personally liable on the note. In mid-March, Walker had told his banker that he was renegotiating with the Union, which action might result in a temporary shutdown. He said nothing to indicate that he planned to "cut and run." The last this banker heard from Walker was a telephone conversation about April 23; after foreclosure and sale of all of Walker's assets, Walker still owed the bank $1,400,000.

The equipment, materials and operating authorites of Walker and IPS were sold to satisfy portions of Walker indebtedness. IED ultimately purchased two of the vehicles and 57 dock carts. It did not seek any of IPS' operating authority. City Delivery, which is operating out of the former IPS terminal, serving a number of IPS' former customers, purchased some of the equipment and the better portions of the authority. It also hired some of IPS' employees, although none from the bargaining unit. Two other trucking concerns and a truck maintenance business (run by a former IPS employee) also operate out of that terminal.

Prior to the April 14 announcement of IPS' closing, there had been no written documentation of the loans from Walker to Sternberg and McElroy. On April 18, upon the advice of their counsel, Sternberg and McElroy went to Kansas City and secured Walker's signature on an agreement formalizing their $25,800 loan, interest free in lieu of severance pay.[27] Walker added the privilege of a 6-month extension of time to repay that loan. Thereafter,

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[27] When William Smith, IPS' operations manager before McElroy, left in 1980, Walker gave him severance pay of $2,000.

Sternberg, McElroy and IED received no additional funds from Walker and they paid nothing to him. Their loan agreement is now an asset held by Bankers Trust. Between April 20 and December 15, McElroy and Sternberg borrowed an additional $89,000, either in their own names or in the name of IED, from another bank.

IED continued to operate after the April 14 announcement, serving the pool customers it had acquired prior to IPS' closing and four additional customers. Two of the new customers had formerly done business with IPS. About 90% of IED's business comes from concerns who had been IPS customers. IED does not serve a large number of the former IPS pool customers. And, whereas IPS had served virtually every city and town in Iowa as well as other locations, IED's service is limited to approximately 35 Iowa cities, Douglas County (Omaha), Nebraska and Rock Island County, Illinois. In the Iowa area it serves the K-Mart, Sears, and Target stores, among others. It maintains no terminal in Omaha; neither does it have any employees residing there. Its Omaha customers are served by its truck delivering from Des Moines.

IED did not use the IPS vehicles when it commenced its operations. For some months it leased trucks from a source different than IPS had used. Thereafter it purchased its own used vehicles. The dock carts it had initially borrowed from IPS were returned in April and IED borrowed and then purchased its own. IED employs, in addition to Sternberg, McElroy, and Clark, five drivers and a part-time clerical employee. The wives of Sternberg and McElroy also perform some clerical duties.

From March until November, IED had a gross volume of business of approximatelv $226,000; it had not, by that time, become prifitable.

H. Analysis and Conclusions

1. IED's Alleged *Alter Ego* Status

General Counsel contends that Walker created IED to further his own business interests, that IED was but a "disguised continuance" of

IPS created to hold the lucrative pool distribution portion of the IPS operations until those operations were resumed. General Counsel seeks a finding that McElroy and Sternberg did not independently form IED; rather, he argues, they merely decided to continue it in operation after Walker elected to go out of business. In seeking such findings, General Counsel argues that it would have been inconceivable for an entrepreneur as concerned with control as was Walker to permit his key management officials to leave his employ and form a competing enterprise. General Counsel points to the fact that Walker financed the start-up of IED with over $25,000, and contrasts this with the $2000 given to William Smith by way of severance pay. He contends that in light of Walker's having defrauded so many creditors by his disappearance, it would not have been logical for him to loan $25,000 to McElroy and Sternberg if he really intended, at the time of those loans, to close permanently. General Counsel also points to the fact that Sternberg solicited IPS' customers for IED while still in the employ of IPS and told those customers and the ICC that IPS would be closing on April 1. Additionally, General Counsel argues that the equipment IED borrowed from IPS, Walker's animus toward the Union, and the various statements by Walker, McElroy, and Sternberg all point to a "disguised continuance."

IED argues that the factors required to establish either alter ego or single employer status, particulary common or substantially identical ownership, common management, common operations, common facilities, common customers, and common control of labor relations are missing, thereby precluding a finding of either alter ego or single employer status.

"To determine whether one legal entity is the alter ego of another, the Board looks to the ownership, management, business purpose, operation, equipment, customers and supervision of the two businesses. Where some of these listed indicia are 'substantially identical' the Board will find an alter ego status. However, not all of these standards have to be satisfied; centralized control of labor relations or identical corporate ownership is not crucial to the finding of an alter ego." Blake Construction Co., Inc.,245 NLRB 630, 634 (1979). See also Crawford Door Sales Co., Inc., 226 NLRB 1144 (1976). Identical corporate ownership is not the sine qua non of alter ego status; however, the presence of "substantially identical" ownership between the two enterprises is a prerequisite to a conclusion that such status exists. Mortons I.G.A. Foodliner, 240 NLRB 1246, fn. 2 (1979); Crawford Door Sales, supra. The term "disguised continuance" is another way of describing an alter ego and the legal requirements to establish the former are identical to those required to establish the latter. In Howard Johnson Co. v. The Detroit Join Board, 417 U.S. 249, 259, fn. 5 (1974) the Supreme stated that alter ego or disguised continuance "cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." See also Marquis Printing Corporation, 213 NLRB 394 (1974).

The facts here, while warranting grave suspicion, fail to establish alter ego status. The essential element, a substantial identity of ownership, is lacking. Sternberg and McElroy owned no interest in IPS and Walker owns no provable interest in IED. Walker's interest-free loan to Sternberg and McElroy is not sufficient to establish that ownership connection and one can not conclude from the record herein that it was anything but a loan. General Counsel argues that it was significantly greater than the $2000 severance pav given William Smith in 1980. In fact, the value of an interest free loan of that amount for 12 to 18 months would very nearly equal severance pay of $2000 to both

Sternberg and McElroy.[28] Moreover, it is not so implausible that an individual as unpredictable as Walker would make such a loan to two of his key managers. If, in fact, he was intending to disappear and default on his obligations, it was not even his money that he was lending. Rather it was the bank's. There was little, if any, "skin off Walker's nose" when he loaned this money out.

Similarly, there is no evidence to establish that Walker continued to control IED even during the period prior to April 14. The management, including the control of labor relations, and all of the operational structures of the two enterprises, appear from this record to be "markedly divergent." See John Fender Electric Company, 244 NLRB 957, fn. 1 (1979). Walker was in absolute control over IPS; he exercised no provable managerial influence upon IED. Compare Big Bear Supermarkets #3, 239 NLRB 179

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[28] Assuming an interest rate of 15%, $25,800 would earn $3870 interest in a year.

(1978), wherein the respondent ostensibly sold its entire interest in a store to a franchisee. There, the Board found alter ego status upon facts establishing that the respondent had sold its interest to the son of a person in its high management, the ostensible franchisee had invested only a minimal sum, and the respondent retained and continued to exercise complete control. Compare also, Circle T Corporation, 238 NLRB 245 (1978), where the original owner retained no share in the new business but retained ownership of all its assets and continued to make all management decisions, and Ramos Iron Works, Inc., 234 NLRB 896 (1978), where the ownership remained within a "closely-knit family business," owner number 2 was seriously undercapitalized, and operational control, facilities, and employees remained the same.

General Counsel acknowledges the very substantial difference in the size and scope of the IPS and IED operations. However, he argues that IED was created only to handle a small but critical portion of the IPS business for a limited period of time and asserts that _alter ego_ status does not require a continuation of the entire business or even a substantial portion thereof. General Counsel's statement of the legal principle is correct. See _Custom Manufacturing Company_, 259 NLRB No. 66 (1981). There, the business of the surviving entity (found to be an _alter ego_) was substantially changed from the original and was found to be a "spin-off of the former businesses tempered by the economic resources available to the principals. . ." In that case, however, the Board affirmed the Administrative Law Judge's finding that there was both substantially identical ownership and management. Moreover, General Counsel's argument assumes that the purpose of IED was to retain "critical" accounts for IPS. The record establishes that IED only secured four accounts, which amounted to approximately 10% of IPS' pool distribution business and less than 3% of its annual gross volume of business. There was no way that the limited business acquired by IED could have contributed in any meaningful way to resumption of the IPS operations.

The other facts to which General Counsel points to establish alter ego status, Sternberg's solicitation of IPS' customers while still on the IPS payroll, (see Custom Manufacturing, supra), the statements of Walker's ownership or control, and Walker's alleged animus, are not sufficient, in and of themselves, to prove that status. If, in fact, Walker had intended from the outset to go out of business and default on his contractual and financial obligations, which is as plausible as any other explanation for the strange set of facts herein, it would cost him nothing to permit Sternberg to take away some of his customers and would further his philosophical preference for "men of brain" over "men of labor." Similarly, in regard to the various statements made by Walker, Sternberg and McElroy, it would appear to be as reasonable to conclude that Walker was seeking to hide, for as long as possible, his true intentions, and to blame the Union for what he intended to do, as to conclude that such statements reflected the true state of affairs. Such conduct is consistent with the attitude which Walker expressed toward the Unions, his employees, and working people in general, which I would characterize more as disdain than animus. General Counsel also relies upon IED's use of IPS' equipment when it first began its operations. Little weight can be placed upon this factor in light of record evidence establishing a cooperative attitude among trucking concerns in regard to such equipment, the minimal amount of equipment involved, and the probability that Walker already intended to permanently close his business and did not care what happened to such equipment.

Finally, the seriousness of the Sternberg-McElroy venture would appear to be at least partly substantiated by their lease of the new facilities and their investment of a substantial sum of money to ready those facilities for their business purposes. There is nothing beyond mere suspicion to indicate that the lease could have been broken or the property utilized by IPS if IPS resumed its business operations. Indeed, in light of Walker's concerns in regard to his operating expenses, it is highly unlikely that he would have wanted to retain this small facility, at $23,000 per year, if he were going to continue in business at IPS.

Accordingly, for all of the foregoing reasons, I must conclude that General Counsel has failed to sustain his burden of establishing by a preponderance of the evidence that IED was an alter ego or "disguised continuance" of IPS such as would make it liable for IPS' unfair labor practices, require it to hire former IPS employees or obligate it to apply the IPS-Local 90 agreement to its operations. As it was not an alter ego of IPS, IED had no obligation to seek out IPS employees to work in its business. Those employees, I note, were still at least technically employed by IPS when IED conducted its hiring and none of them applied for employment at IED.

I shall therefore recommend that both complaints, to the extent that they allege that IED committed or was responsible for unfair labor practices, be dismissed.

2. Section 8(a)(1)(3) and (5) Violations by IPS and Walker

By reason of their failure to answer the complaints against them, without having shown good cause therefor, Walker and IPS have admitted the uncontroverted allegations of those complaints and those allegations are found to be true. McGregor Building Services, *supra*.

The complaints allege that IPS and Walker locked out their employees in the Des Moines, Iowa and Omaha, Nebraska terminals in retaliation for their union membership, activities and support. The record evidence unquestionably supports these allegations. Thus, it is clear that Walker locked the employees out in order to force Local 90 to agree to an unscheduled mid-term modification or termination of its collective bargaining agreement and continued that lockout with the expressed intent of hurting the employees. He wanted to prove to them, by depriving them of their wages, that he, not their union, controlled their destinies and their welfare. Such action violates Section 8(a)(3) and (1) of the Act. See, e.g., Dimo Ambulette Service, Inc., 255 NLRB No.2 (1981).

The complaints allege, and the uncontroverted evidence establishes, that Walker and IPS permitted or encouraged the transfer of a portion of bargaining unit work to IED without notice to or bargaining with the Union. By such conduct, they have violated Section 8(a)(5) and (1) of the Act. See Brown Company, 234 NLRB 769, 771 (1979).

The complaint in Case No. 18-CA-7146 alleges, and the uncontroverted evidence establishes that IPS and Walker locked out their employees on March 23, 1981 and otherwise completelv abrogated its collective bargaining agreement with Local 90[29] in order to force that Union to agree to an unscheduled mid-term modification or termination of that agreement and thereafter refused to bargain in good faith with Local 90, in violation of Section 8(a)(5) and (1) of the Act.

The record conclusively establishes that IPS and Walker went completely out of business on Abril 14. 1981. Accordingly, notwithstanding the technical admission of the complaints' allegations, I cannot find that IPS violated either Section 8(a)(3) or Section 8(a)(5) of the Act by its implicit discharge of the employees on that date, regardless of motive, or its failure and refusal to bargain with either

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[29] That agreement, at Article 9(c), included a provision prohibiting the parties from resorting to strikes or lockouts "without first using all possible means for peaceful settlement of any controversy..."

Local 90 or Local 554 thereafter. First National Maintenance Corporation v. N.L.R.B., 452 U.S.666 (1981); Textile Workers Union of America v. Darlington Manufacturing Co., 380 U.S.263 (1965). Accordingly, I shall recommend that all allegations of unfair labor practices by IPS and Walker on and after April 14, 1981, be dismissed.

IV. The Remedy[30]

Having found that Respondent IPS has engaged in unfair labor practices within the meaning of Section 8(a)(1)(3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain action designed to effectuate the policies of the Act. Having found that IPS and Walker locked out the employees of its Des Moines, Iowa, and Omaha, Nebraska terminals in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that IPS and Walker be required to make each of these employees whole for any loss of pay or other earnings they may have suffered as a result of the discrimination against them from the commencement of the lockout on March 23. 1981 until the permanent and total cessation of IPS' business operations on April 14, 1981. Any backpay found to be due shall be computed in accordance with formula set forth in F.W.Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977).[31]

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[30] It is recognized that any remedy ordered herein may be entirely illusory in view of Walker's disappearance and the foreclosure of all of his and IPS' assets.

Similarly, as Walker and IPS violated Section 8(a)(5) bv its lockout and refusal to bargain in good faith with the Union prior to the April 14, 1981 closing, I shall recommend that they be ordered to cease and desist from engaging in such conduct in the future. However, in view of the cessation of operations, no affirmative order requiring them to bargain will be recommended.

Respondent IPS and Walker's unfair labor practices affected all of their employees, constituted a complete negation of their bargaining obligation, and demonstrated a general disregard for the employees' fundamental statutory rights. They therefore warrant the imposition of a broad injuntive order precluding Resoondent Walker or Resbondent IPS, their officers, agents, successors, and Mid-Continent Refrigerated Service Company, 228 NLRB 917 (1977) and Federal Alarm, 230 NLRB 518 (1977).

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[31] See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962)

Further Conclusions of Law

1. Respondent IED was not the alter ego of, or a single employer with, Respondent Walker or Respondent IPS.

2. By locking out their employees at the Des Monies, Iowa and Omaha, Nebraska terminals, because of their union activities, membership, and support, in order to force or require Local 90 to agree to an untimely mid-term modification or termination of its collective bargaining agreement, Respondent Walker and Respondent IPS

have violated Section 8(a)(3) and (1) of the Act.

3. The following employees of Respondents Walker and IPS constituted units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

(a) All drivers and warehouse employees, including city men, road drivers and dock men employed by IPS at its Des Moines, Iowa terminal; excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act, as amended.

(b) All full-time and regular part-time sorters, preloaders, loaders packaging route drivers and feeder drivers employed by Iowa Parcel Service at its factility located at 4512 South 88th Street, Omaha, Nebraska; excluding all office clerical employees, guards, watchmen, and all professional and supervisory employees as defined in the Act.

4. At all time material herein, Local 90 has been the duly designated exclusive collective bargaining representative of IPS and Walker's employees in that unit described above in subparagraph (a), above and at all material times, Local 90 has been recognized as such representative by Respondents Walker and IPS.

5. By transferring some of the pool distribution operations from IPS to IED on or about March 23, 1981, without notice to or bargaining with Local 90, and by engaging in a lockout of their employees in order to force or require Local 90 to modify or terminate its collective bargaining agreement, Respondents Walker and IPS have failed and refused to bargain in good faith and have violated Section 8(a)(5) and (1) of the Act.

6. Respondent IED did not engage in any of the unfair labor practices not specifically

found herein.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[32]

ORDER

Respondents Iowa Parcel Service, Inc., and William K. Walker individually and as alter ego of Iowa Parcel Service, Inc., their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discriminatorily locking out their employees because of their union activities, membership or support or in order to force or require their collective bargaining representative to modify or terminate its collective bargaining agreement.

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[32] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Unilaterally transferring bargaining unit work to other employers without notice to or bargaining with the Union.

(c) Failing and refusing to bargain in good faith with Local 90 as the collective bargaining representative of its employees in an appropriate unit by engaging in a lockout in order to force or require said Union to modify or terminate its collective bargaining agreement.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action, which is necessary to effectuate the policies of the Act:

(a) Make all of their employees whole for any loss of earnings they have suffered by reason of the unlawful lockout, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Copies of the attached notice marked "Appendix,"[33] on forms provided by the Regional Director for Region 18, shall be duly signed by Respondents' representative and mailed to Local 90, to Local 554 and to all of the employees who were employed at the Des Moines,Iowa and Omaha, Nebraska facilities of IPS as of April 14, 1981.[34]

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[33] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[34] In the event that neither Walker nor any other representatives of IPS can be found to sign the attached notice, it is recommended that the Regional Director mail copies of said notice, unsigned, to each of the employees and to the charging parties with an explanatory letter. In view of IPS' total cessation of business operations on April 14, 1981, and the termination of its occupancy of the facilities wherein it conducted its business, no purpose would be served by requiring that the notices be posted at IPS' places of business.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports,and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. June 2, 1982.

Michael O. Miller
Administrative Law Judge

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AFTER A HEARING IN WHICH ALL PARTIES WERE AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE, IT HAS BEEN FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS AND WE HAVE BEEN ORDERED TO POST THIS NOTICE AND TO CARRY OUT ITS TERMS.

The National Labor Relations Act, gives you, as employees, certain rights, including the right:

To engage in self-organization;
To form, join or help a union;
To bargain collectively through a representative of your own choosing;
To act together for collective bargaining or other mutual aid or protection and
To refrain from any or all of these things.

WE WILL NOT lock out our employees because of their union activities, membership or support or in order to force or require their collective bargaining representatives to modify or terminate its collective bargaining agreement.

WE WILL NOT unilaterally transfer work of our employees in the appropriate collective bargaining unit to other employers without notice to and bargaining with General Team and Truck Drivers, Helpers and Warehousemen, Local Union No.90, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT in any other manner interfere with restrain, or coerce our employees in the exercise of rights, guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL make whole all the employees of our Des Moines, Iowa and Omaha, Nebraska facilities for any loss of wages and other benefits they may have suffered by reason of the unlawful lockout which took place from March 23, 1981 through April 14, 1981.

IOWA PARCEL SERVICE, INC.,
and WILLIAM K. WALKER,
individually and as its
alter ego.
(Employer)

Dated________________By______________________

ROGERS, PHILLIPS & SWANGER
ATTORNEYS AT LAW
510 Hubbell Building
Des Moines, Iowa 50300

June 10, 1981

Mr. Richard Anderson
Resident Office
Region 18
National Labor
Relations Board
907 Walnut Street
Des Moines, Iowa 50309

Re: Iowa Express Distribution, Inc.
Case No. 18-CA-7146

Dear Mr. Anderson:

In view of the fact that Iowa Express Distribution, Inc., was not even named as a respondent in the original charge, or given an opportunity to respond to the amended charge filed against it by Teamsters Local 90 or to give any evidence in opposition to such charge, we would like to take this opportunity to state the position of Iowa Express regarding these charges as they relate to Iowa Express. We cite in this statement the official transcript of

Exhibit III

testimony in the Iowa Transportation Regulation Board hearing in the matter of Iowa Parcel Service, Inc., held April 22, 1981, because we are told by the Region that it relied on testimony therein as the basis for the Board's complaint.

Iowa Express Distribution, Inc., was formed February 27, 1981, by its two officers and stockholders, Harold Sternberg and Randy McElroy. [TR 70]. Both Sternberg and McElroy had been involved in the trucking business for a number of years. Sternberg was employed by Iowa Parcel Service, Inc. [IPS] for about 24 years. He began his employment with IPS as the sales manager, with no direct supervisory responsibilities. In that capacity he promoted IPS and acquired new shipping accounts for the business. Prior to his employment with IPS, Sternberg was employed by Continental Trailways as a District Manager and Des Moines Bus Depot

Manager, and in those capacities also had duties of sales and solicitation of accounts, as well as some supervisory responsibility.

Sternberg's work for IPS as sales manager continued until 1978, when the Company was acquired by Merchants Delivery, a company owned by William Walker, and Sternberg was promoted to Executive Director. As Executive Director, Sternberg had general responsibilities for the operation of IPS, but he continued to have considerable contact with all IPS accounts.

Sternberg was never formally named an officer of IPS. One day Walker asked him to sign a document in the capacity as Vice President because the form required such a signature. As John Iles, past corporate secretary and company comptroller, recalled, Walker just came into his office one day and told Iles who to list on the annual report as corporate officers. [TR 150]. Iles, who was listed as secretary, was not a stockholder of IPS, as it was then held, and did not attend any board or stockholders meetings. [TR 150]. In fact, he was not aware that any board or stockholders meetings were ever held during the period that Merchants owned the company. [TR 150]. Sternberg also never attended a stockholders or board meeting of IPS, and is uncertain as to how long he may have been listed as Vice President of IPS before he knew of it. Sternberg has no stock in IPS, Merchants' or any of Walker's other corporations.

Randy McElroy first became employed by IPS as a parts boy in 1965. A year later he was promoted to work in the claims office. McElroy then left IPS for two years in the Navy and returned to work on the dock and as a truckdriver. McElroy had another break in service for two years of schooling and returned to work first on the dock and then in the claims office. McElroy was promoted to terminal manager in about 1977, and then to operations manager in December, 1979.

As Operations Manager, McElroy oversaw the operations of the Des Moines terminal, including the drivers, dock workers and road drivers. [TR 16]. While McElroy had the authority to hire a particular employee, all increases or decreases in the number of employees in the work force were approved by Walker. Walker reviewed all termination actions, before they were taken.

After Walker became involved as President of IPS, he took an active part in managing the Company. All major equipment purchases and sales were approved by Walker. Walker would determine if the number of contract agents was too high or too low and what changes to make. The business was under his direction on a seven day a week basis. While Walker's residence was in Kansas City, he made weekly trips to the

Des Moines IPS depot, coming into Des Moines on Sunday night and working at IPS on Monday and Tuesday and returning to Kansas City on Tuesday night. As one IPS employee acknowledged "Mr. Walker came, normally, to Iowa Parcel on Mondays, and that was our day to air any grievances or any talks that we might have. We usually did this on Monday." [TR 167]. During the summer of 1980, Walker came to IPS on Sundays and stayed through Thursday for six to eight weeks in a row. After working in the office all day, Walker went on the dock and worked a large part of the evening, trying to straighten out some materials handling difficulties IPS was having.

Outside of the preparation of financial statements, the finances of IPS were entirely handled by Walker [TR 24, 36, 37, 103, 138, 151 and 153]. Walker did not even consult with Iles or Sternberg when arranging loans involving

IPS [TR 151]. While McElroy had some idea that Walker had transferred some sums of money out of Iowa, he had no idea how much money was involved. [TR 102]. Prior to March 23, 1981, Walker even had accounts receivable payments transferred to Kansas City. [TR 102]. In the only collective bargaining agreement negotiated with Teamsters Local 90 during Walker's ownership, Walker acted as the spokesperson for IPS, with Bill Smith, the operations manager who left IPS in December, 1979, and Sternberg sitting in on the bargaining team. McElroy was not involved in these negotiations.

Both the Iowa Transportation Regulation Board, after a hearing on the matter, and the Regional Office have found IPS to be completely controlled in its operation by William K. Walker.

> "The Board FINDS that the operations of Iowa Parcel Service, Inc. have, since March of 1978, been managed and controlled by William K. Walker, as an individual rather

> than as a corporate officer, and that since July of 1980 the control and direction of IPS has been exercised through the Kansas City, Missouri office of Merchants Delivery Company." Iowa Parcel Service, Inc., Docket No. FC3, Order Suspending Operations and Initiating Revocation Proceeding, Iowa Transportation Regulation Board, (May 14, 1981) p.5.
>
> "Testimony introduced at hearing indicates that William K. Walker exercised complete control of the activities of Iowa Parcel Service, Inc. He had the final say on contracts with employees and agents, appointed corporate officers, arranged for the purchase of equipment, established financial policy and arranged for loans to the corporation. It was William K. Walker who decided to call a temporary halt to operations by IPS on March 23, 1981, who told his employees to ignore the Board's Order of March 31, 1981, and to ignore the district court order of April 10, 1981, and who eventually decided on April 14, 1981, that IPS would permanently discontinue operations in Iowa." Id. p. 14-15.
>
> "At all times material herein, IPS and William K. Walker have been affiliated as a business enterprise with actual ownership and complete control over the business operations and labor policy affecting employees of said enterprise vesting in William K. Walker; have shared common business locations; have commingled and intermingled assets for purposes related to the business enterprise; and have held themselves out to the public as a single, integrated business enterprise." Paragraph

5(b), Complaint in Case No. 18-CA-7146. NLRB

During the periods of Sternberg and McElroys' employment, IPS operated as an intrastate common carrier, interstate common carrier and had air freight authority. This wide variety of transportation authority is difficult to obtain and in some instances such authority has been sold as an asset of the company holding it. IPS provided transportation service to the entire state of Iowa, including over 1,000 towns within that area. IPS had interline service to fourteen other states and direct service to Douglas County, Nebraska, Rock Island County, Illinois and Sioux Falls, South Dakota. IPS operated terminals in Des Moines, Iowa, Waterloo, Iowa, and Omaha, Nebraska. [TR 146]. The Des Moines terminal was a 50 dock door building with 30,000 square feet, not including the office space. In providing transportation services in the areas described, IPS had approximately 5,000 customers.

IPS directly employed, on a regular basis, approximately 100 drivers and dock workers and 25 office personnel. IPS was also a party to service contracts with approximately 100 service agents. These service agents contracted with IPS to deliver freight to various customers. Generally IPS made a freight drop to the dock rented by the agent and the agent made deliveries and pickups from the customers. [TR 183]. Berkley Fletcher supervised the operations involving the contract agents and made the contracts on behalf of IPS. [TR 20].

The vehicles owned or controlled by IPS included 34 straight trucks, 125 agents' straight trucks, 17 tractors, and 36 semi-trailers. The methods of handling freight used by IPS included a sophisticated conveyor system capable of unloading 4 trailers, sorting freight and loading 17 trucks in one continuous operation. IPS had a full maintenance shop and 3 full-time mechanics for complete truck and trailer repair. The IPS facilities also included gasoline and diesel fuel pumps and an extensive parts inventory.

The revenue accounts of IPS included magazines, films express freight, air freight, Avon, services charges and fuel surcharges. Daily revenues for IPS were approximately $26,000. The 1979 Annual Report showed gross revenue of $7,395,616, and IPS's 1980 profit and loss statement showed total revenues of $7,311,967.

After Sternberg and McElroy learned of the possibility that IPS might cease operations, they considered what other employment opportunities might be available to them and decided to begin a small trucking firm. They incorporated Iowa Express Distribution, Inc. on February 27, 1981. They were and continue to be the sole shareholders, officers and directors of Iowa Express. Sternberg and McElroy obtained a $10,000 bank loan as part of the capital for the business. Neither Sternberg nor McElroy are related to William Walker by blood or marriage. Neither Walker nor any of his relatives or companies hold any stock in Iowa Express.

After incorporating, Sternberg and McElroy arranged for the lease of a terminal building and 6 trucks (in both cases from lessors different from those used by IPS). Iowa Express has a four dock door terminal with only 7,500 square feet, including office space, and six rented straight trucks. Iowa Express applied for and obtained ICC contract carrier authority. IPS did not operate under any contract carrier authority, and this type of authority is considerably less valuable than the types of authority held by IPS. Iowa Express did not apply for any of the operating authority held by IPS, while a number of other trucking firms have. Sternberg contacted five firms seeking shipping accounts for Iowa Express. Only four of these, Meldisco, K-Mark, Target and Maremont, were at the time of contact part of IPS's 5,000 current customers. The other account, Federal Warehouse, was a former IPS customer that had terminated service with IPS some 6 to 8 weeks before beginning with Iowa Express. The Iowa Express revenue from these accounts represents less than one percent of IPS's revenues. [approximately .37 percent]. Iowa Express' revenue accounts include only express and fuel surcharges.

Sternberg was actively employed by IPS until March 23, 1981, when he began devoting his full-time efforts to Iowa Express Distribution. [TR 80]. At the date of his last active employment by IPS, Sternberg was entitled to five weeks vacation. Sternberg continued to receive payroll checks from IPS through April 10, 1981. Randy McElroy's last day of work for IPS and his final payroll period ended April 24, 1981. Neither Sternberg nor McElroy have seen, talked to or had any correspondence or communication with William K. Walker since Saturday, April 18, 1981. Obviously, Walker has no control over the operations or labor relations policies of Iowa Express.

IPS has historically granted severance pay to terminated managerial employees. Sternberg, who was earning between $35,000 and $40,000 annually, and had 24 years of service with IPS, was entitled to severance pay. McElroy, who was also earning between $35,000 and $40,000 annually, and had 12 years of service with IPS, also was entitled to severance pay. Their severance pay was in the form of an interest-free loan of $25,845 to be repaid by them in six months, with one possible six month extension.

At a 17 percent interest rate, then the market rate, their severance pay amounted to $2,196.40 each.

Iowa Express' shipments for customers began March 23, 1981. Its work force is nine drivers and dock workers and a total office staff of 4. No contract agents are utilized by Iowa Express. These employees were hired the second and third week of March, 1981. One office clerical employee and a foreman were formerly employed by IPS. Several weeks after Iowa Express had hired its complete employee complement, 3 or 4 of the former IPS drivers and dock workers called to inquire about employment at Iowa Express. However, none of them made formal application for employment, and there is no evidence of any discriminatory refusal to hire any former IPS employee.

Iowa Express now provides direct contract carrier service for its four customers to 25 towns. It uses a manual system of unloading freight into carts, sorting it by hand and loading trucks from carts. The Iowa Express facility has no maintenance shop or mechanics, and it has no fuel pumps or parts inventory.

Many other Iowa carriers have a much larger proportion of former IPS revenue accounts than the minuscule number serviced by Iowa Express. It is estimated that about 25 percent dollar volume-wise of the former IPS accounts are currently serviced by Purolater Courier and about 60 percent by United Parcel Service. A number of other carriers have applied for former IPS transportation authority, including Employees Parcel Service, Inc., made up of former IPS employees. Iowa Express has by no means duplicated the service or continued the business of IPS. See the attached article.

While Walker encouraged Sternberg and McElroy, who had both dedicated a large part of their careers to IPS, to begin their own business, Walker advised them that he was not interested in becoming involved with their operation because it was too small an operation. [TR 111]. In his meeting with Local 90 agents after he closed IPS, Walker did refer to Iowa Express as a "device" of his to protect or hold on to pool freight. [TR 119]. The facts do not bear out Walker's statement. In view of the size of Iowa Express, it does not have the capacity to serve as such a device, and neither Sternberg nor McElroy made any attempts to "hold on" to many of the larger pool accounts serviced by IPS. A union member and former IPS employee, Douglas Steele acknowledged Walker had not been entirely truthful about many things, and Walker's statement about Iowa Express may have been a stalling tactic for his own IPS labor negotiations. [TR 174-175]. The Iowa Transportation Regulation Board after a hearing on the issue held:

> "The Board FINDS that William K. Walker acknowledged an interest in Iowa Express Distribution by statements made to IPS employees but the Board is unable to determine whether such statements constitute an admission or an attempt to mislead the union into believing that the shut down of operations was only temporary." *Id*. p. 13.

Initially, Iowa Express borrowed a few dock carts and a forklift from IPS to use in its operation, but after a short period returned these carts and forklift and secured others from another source. Iowa Express did not use any IPS trucks, and did not move any IPS freight from the IPS docks to Iowa Express. On Saturday, March 21, 1981, McElroy did work with some Warwick drivers to get freight moved out of the IPS facility. The freight was initially scheduled to go to Continental Warehouse, but that company did not want to become involved with IPS's disputes, and the IPS freight was eventually all moved to Bell's Delivery, Inc.

None of Iowa Express' drivers were involved in the move. While one of the former IPS employees testified that he had seen IPS shipping bills with the name crossed off and Iowa Express written in, this type shipping document is frequently changed by the line haul carrier. Many of the shippers have their shipping bill forms computerized, and while the computer may be programed for IPS, the shippers frequently make other arrangements for delivery and change the form. Iowa Express did not transfer any freight from the IPS facility to its docks. In fact, after the cessation of operations by IPS, McElroy referred many shippers to Crouse Cartage and carriers other than Iowa Express.

The Teamsters have charged that Iowa Express Distribution is an alter ego of Iowa Parcel Service and/or William K. Walker and that it is a "run-away shop" type operation. "Alter ego" is a finding that a new company is really the former one in disguise, and has merely changed its outward form. Typical of the application of the alter ego doctrine is James K. Stennitt, Inc., 215 NLRB No. 143 (1974), where, in the context of a collective bargaining contract, the principal corporate officer notified employees that the existing firm was going out of business and that they were fired. He then reincorporated and began business two months later transporting materials for the same customers, with the same equipment out of the same terminal, and with the exception of the bargaining unit employees, with the same personnel.

In determining alter ego status, "common ownership alone is not sufficient. There must be in addition such actual or active common control as distinguished from merely a potential, as to denote an appreciable integration of operations and management policies." Milo

Express and Keystone Lawrence Transfer Co., 212 NLRB 313 (1974), cited with approval in Remke Central Div., 227 NLRB No. 287 (1977).

The fact that several of the former company's management decide to use their business expertise and contacts to begin a new business after the cessation of the former firm's operations does not taint the new operation as an alter ego. The Board so held in Meatcutters Local 567 v. NLRB F2 , 106 LRRM 2187 (DC Cir. 1980), even though the new owner had some minority stock ownership in the former company. In Meatcutters Local 567 v. NLRB, the former company's manager, who was a minority stockholder of that company, and who as manager was responsible for the day-to-day operations of the company and for labor relations, including negotiations, bought the company from the majority stockholders along with a new partner. The former company manager's duties remained basically the same in the new operation. The Board and the Court refused to find the new company was an alter ego of the former corporation. The Court said:

> "The Supreme Court has stated that in an alter ego situation there is 'a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances the courts have had little difficulty holding that the successor is in reality the same employer and is subject to the legal and contractual obligations of the predecessor.' Howard Johnson Co. v. Hotel & Restaurant Employees, 417 U.S. 249, 259 n.5, 86 LRRM 2449 (1974). The Board has developed the following standards for deciding whether 'the successor is in reality the same employer': 'Clearly each case must turn on its own facts, but generally we have found alter ego status where two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers and supervision, as well as ownership,' Crawford Doors Sales Co., 226 NLRB 1144, 94 LRRM 1393 (1976).'

The record in that case established that the sale of the business was not a "paper transaction without meaningful impact upon the ownership and operation of the enterprise", but rather was an armslength transaction. 106 LRRM at 2190.

In the trucking industry, the NLRB in Genova Express, Inc. 245 NLRB No. 28 (1979) refused to find the two truck-in-corporations, one owned by a father,.and the other by his son, were a single employer even though they operated out of the same terminal. The two corporations had separate owners, officers, directors and managers, maintained separate records and checking accounts, and serviced different community interest between the two employee groups.

The Union makes much of the interest free loan extended as severance pay from IPS to Sternberg and McElroy. In view of their length of service to IPS, their former positions with IPS and the amount of their salaries at the time of the termination of the operation, the $2196.40 savings in interest payments given to each of them appears to be not only reasonable, but minimal. This personal loan to Sternberg and McElroy does not give IPS or Walker the required control over Iowa Express operations to establish it as an alter ego. There is nothing in the note, which evidenced the loan, to indicate any right of IPS to any security interest in Iowa Express or interest in the profits of Iowa Express. Even if this loan were considered continued financial interest in the Iowa Express operations, continued financial interest in the new operation is not sufficient for a finding of alter ego. In Love's Barbeque Restaurant, 245 NLRB No. 17 (1979), the operator of a franchised restaurant was found to be an employer apart from the company that franchised the restaurant to the operator. The operator made significant initial investment in the business, and even though he was obligated to pay additional amounts to the company, he was not required to pay a percentage of his profit and had the independence to price his own products and select suppliers. There was no control by the former company over labor costs, and the operator retained control over labor relations. This lack of control over labor relations was also a key element to a finding by the Board of no joint employer status.

Iowa Express was not established by IPS or by William K. Walker as a subordinate instrument to, and a disguised continuation of, IPS. Iowa Express has not been operated with common officers, owners, financial control, management or supervision to that of IPS. Iowa Express has independently formulated its own labor policy, independently solicited its own customers, and personnel and arranged for its own equipment. It is not an alter ego of IPS and is not a single employer with IPS within the meaning of the NLRA.

An attempt by the Board to shift any

alleged unfair labor practice liabilities of IPS to Iowa Express is to make Harold Sternberg and Randy McElroy guilty by association. It means that two individuals, who have dedicated their whole working careers to the shipping and transportation business, do not have the freedom to use that knowledge and expertise and to make employment opportunities for themselves when it became apparent that their future with IPS was ended. The facts of this case do not approach those required to extend unfair labor practice liability to a third party and are clearly distinguishable from the Board's lead case in that area, Golden State Bottling Company v. NLRB, 414 U.S. 168 (1973). Here there was no sale or other transfer of IPS stock, customers, facilities or equipment, or other assets- or any contractual relationship -- between IPS (or Walker) and Iowa Express. Iowa Express is by no means a continuation or alter ego of IPS or William Walker's trucking operations, no more than United Parcel or Purolater Courier, which have continued to a vastly greater extent the delivery services of IPS.

It cannot reasonably be argued that Iowa Express played any part in an alleged breach of the IPS-Local 90 contract, violated the notice provisions of § 8(d) of the Act or discriminatorily locked out or terminated IPS employees. A bargaining order against Iowa Express, forcing its nonconsenting employees to accept a labor organization they never designated as their exclusive representative, and the other extraordinary remedies sought, are wholly unjustified. The complaint against Iowa Express should be withdrawn.

If you have any further questions, please advise.

Sincerely,

John R. Phillips

Kathleen A. Reimer

KAR/fy
cc: Robert J. Wilson
Randy McElroy
Harold Sternberg

Equal Access to Justice Act,
29 U.S.C. §504.

Section 504. Costs and fees of parties.

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

National Labor Relations Act,
as amended, 29 U.S.C.

§153 (d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

July 5, 1935,c.372,§ 3,49 Stat.451; June 23, 1947, c.120, Title I, § 101, 61 Stat. 139; Sept. 14, 1959, Pub.L.86-257, Title VII, §§ 701 (b), 703, 73 Stat. 542.

§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an

employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held

as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: PROVIDED FURTHER, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to

the provisions of section 159 (a) of this title.

§160 (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 C.F.R. § 101.4. Investigation of Charges

Section 101.3 (Reserved)

When the charge is received in the regional office it is filed, docketed, and assigned a case number. The regional director may cause a copy of the charge to be served upon the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10(b) of the Act is the exclusive responsibility of the charging party and not of the general counsel or his agents. The regional director requests the person filing the charge to submit promptly evidence in its support. As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned to a member of field staff for investigation, who interviews representatives of the parties and other persons who have knowledge as to the charges, as is deemed necessary. In the investigation and in all other stages of the proceedings, charges alleging violation of section 8(b)(4)(A), (B), and (C), charges alleging violation of section 8(b)(4)(D) in which it is deemed appropriate to seek injunctive relief under section (10)(l) of the Act, and charges alleging violations of section 8(b)(7) or 8(e) are given priority over all other cases in the office in which they are pending except cases of like character; and charges alleging violation of section 8(a)(3) or 8(b)(2) are given priority over all other cases except cases of like character and cases under section 10(l) of the Act. The regional director may in his discretion dispense with any portion of the investigation described in this section as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, and settlement: or, the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first.